TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1[redacted]1922

No.[redacted]32

NATIONAL UNION FIRE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT WANBERG.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

FILED FEBRUARY 25, 1921.

(28,114)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 233.

NATIONAL UNION FIRE INSURANCE COMPANY, PLAINTIFF IN ERROR,

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ROBERT WANBERG.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

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STATE OF NORTH DAKOTA, IN DISTRICT COURT,
ss.
County of Williams. Eleventh Judicial District.

ROBERT WANBERG,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, of Pittsburg, Pa., a foreign insurance corporation.

Defendant.

SUMMONS.

The State of North Dakota to the above named defendant:

You are hereby summoned to answer the complaint in the above entitled action, which complaint is hereto attached and herewith served upon you, and to serve a copy of your answer to said complaint, on the subscriber at his office in the City of Williston, Williams County, North Dakota, within thirty days after the service of this summons upon you, exclusive of the day of such service, and in case of your failure to appear or answer within such time, plaintiff will take judgment against you by default for the relief demanded in said complaint. Trial desired in Williams County, North Dakota.

Dated at Williston, North Dakota this 18th day of March, 1918.

WM. G. OWENS,
Attorney for the Plaintiff,
Office and postoffice address:
Williston, North Dakota,

ROBERT WANBERG,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, of Pittsburg, Pa., a foreign insurance corporation,

Defendant.

COMPLAINT.

Plaintiff alleges:

I.

That at all times herein mentioned the defendant was and still is a foreign corporation with its principal place of business at Pittsburgh, Pa., and during such time engaged in and

authorized to transact the business of insuring crops of small
4 grain, to-wit: wheat, flax, rye, oats, barley and speltz against loss or damage from hail or failure from drought, hot winds, hot weather, or other causes, within the State of North Dakota or elsewhere, and was so authorized under the law and in conformity with the laws relative thereto of the State of North Dakota.

II.

That at all times hereinafter mentioned the plaintiff was the owner and in possession of and farmed lands located in Williams County, North Dakota, and described as follows, to-wit: (Land properly described) (as described in Ex A.) and was the owner and had an insurable interest in the crops grown on said land during the year 1917 on such premises, and the extent of such insurable interest being hereinafter set forth
5 and shown by the application for insurance hereinafter referred to and made a part of this complaint as "Exhibit A." (Exhibit one)

III.

That on the 12th of July, 1917, at 10 o'clock in the forenoon of that day, the plaintiff made, executed and delivered to the defendant in writing his certain application for insurance, which said application is hereinafter referred to and hereby made a part of the complaint as "Exhibit A," and at which time of making said application the plaintiff paid to the defendant the sum of One hundred forty dollars ($140.00) in consideration of which sum to it paid by the plaintiff, the defendant insured him against damage to and loss of the crops of small grain as set forth in said application, from hail and other
6 causes therein set forth, excepting fire, floods, winter kill, or failure on the part of the plaintiff to properly prepare the ground for seeding and to properly seed, care for, harvest, protect and thresh the said crop, to the amount of Fourteen Hundred Dollars ($1400.00), and in compliance with said application, the defendant agreed to make good unto the plaintiff for all loss as set forth in said application, and especially any loss or damage by reason of hail, on the basis of Seven Dollars ($7.00) per acre on his said crop to be so sown and grown on the said lands during the season of 1917, and particularly during the term and period between the 12th day of July, 1917, and the 15th day of September, 1917, at noon, and it was expressly provided that the loss, if any, should be paid on proof on or before the 1st of November, 1917, which said application and the said premium on said insurance was by plaintiff duly delivered to the duly appointed authorized and acting agent of the said defendant company. That among other provisions of

the said application and contract, the plaintiff agreed with the defendant: 7

"I further agree that in the event of the total destruction of said crop or its total failure from any cause, I will within three days after such destruction so notify said Company by registered mail at its office at Waseca, Minnesota.

I agree that if said crop becomes damaged so that its value is reduced below $7.00 per acre as herein computed, that I will notify the Company thereof, and in good time to permit it to cause said crop to be viewed before same should be cut and harvested in the usual course of good farming in the community where said crop is, and I further agree that if at the time of threshing, I claim or have claimed damage to or failure of said crop, I will within three days after said threshing is completed, mail to the Company at Waseca, Minnesota, by registered United States mail a statement sworn to by myself, and 8
the thresher, giving the amount of each kind of grain threshed from such crop, and I further agree that all claims made under any policy issued to me under this application shall be sent to the Company on or before the 20th day of September, 1917, and in no event shall the Company be liable for claims after September 20th, 1917.

I further agree that in the event of a partial loss of said crop the amount of damage shall be determined by computing the value of the crop remaining by the following value of each grain, viz: wheat one dollar per bushel; flax, one and 75-100 dollars per bushel; rye, seventy cents per bushel; oats, barley and speltz fifty cents per bushel, and the damage thereto shall be the difference between the amount for which said crop is insured and the value obtained as herein provided. 9

I further agree that the damage to said crop, if any, shall be ascertained by deducting the value of the entire crop, so computed as above, from the value of same at Seven Dollars per acre.

I hereby agree that the acceptance by me of the policy issued upon this application shall be an acceptance by me of all the conditions therein contained, and I agree to send all notices or claims to the Company by registered U. S. Mail.

I further agree that this application and the policy issued to me, shall constitute the entire contract regarding the insurance hereby applied for."

IV.

That during the season of 1917 and particularly during the period covered in said application for insurance as hereinbefore set forth and before the grain was ripe and was cut, and while the said application of insurance was in full force and

10 effect, and on the 14th day of July, 1917 and about 6:15 P. M. of that day and after 24 hours from the time of execution of said application and the payment to the said company of the premium thereon, the crops growing on the said lands mentioned in said application as herein referred to, to-wit:

104 acres of wheat
14 acres of flax
52 acres of oats
30 acres of barley

was hailed out and destroyed and that none of the damage or loss to such crop resulted from either fire, floods, winter kill, or failure on the part of the plaintiff to properly prepare the ground for seed or to properly seed, care for, harvest, protect and thresh said crop during the said season of 1917.

V.

11 That the ground on which said crops were so sown was prepared for seed, and all such crops were properly cared for, seeded and protected, harvested and threshed, all at the proper time and in a good and farmerlike manner and plaintiff done all things necessary and usual to protect the same, and notwithstanding labor, care and skill said crops became damaged by the causes hereinbefore alleged and insured against, viz: hail, so that their value was reduced belowe Seven Dollars ($7.00) an acre as computed by the terms expressed in the application and acceptance thereof by the said insurance company, and that thereafter the plaintiff did duly proceed to care for the said crop in a good husbandlike manner and according to the best of his ability and did harvest, care for, thresh and garner the same, and did save from said crops kinds and quan-
12 tities of grain of the values, when computed at the rate and price specified in said total salvage or saving consisting of twenty acres of wheat, one hundred twenty-five (125) bushels of oats, nineteen (19) bushels of flax, sixty (60) bushels of barley, of the value of One Hundred Forty-five & 75-100 Dollars ($145.75), which said sum should be and is hereby credited on such total insurance.

VI.

That the plaintiff did claim damages by reason of the destruction and loss by reason of hail, and after procuring and threshing the said crop, mailed to the defendant by registered United States mail duly addressed to the Company at Waseca, Minnesota, a statement giving the number of bushels of each kind of grain threshed from the crops so insured, said statement being sworn to by the plaintiff, and the thresher, having prior thereto notified the said defendant of the loss by reason of such hail storm.

VII.

That after deducting from the total amount of the insurance 13
and giving to defendant full and fair credit under the terms of said contract for all grains raised upon said lands insured, at the price agreed upon in the application for insurance, the defendant is justly indebted to the plaintiff on account of said contract in the sum of Twelve Hundred fifty-four & 25-100 Dollars ($1254.25) with interest thereon at the legal rate, at the rate of 6% per annum from the 1st day of November, 1917, in which said sum the plaintiff has suffered damage.

VIII.

That said loss, damage or failure did not occur from any one of the causes excepted in the said application and contract for insurance.

IX.

That the plaintiff did not during such time have other pol- 14
icies of insurance on such crops.

X.

That the plaintiff duly performed all the conditions on his part to be done and performed and in accordance with the terms and conditions of said application and contract for insurance.

XI.

That the plaintiff has demanded and caused to be demanded of the defendant the payment of the sum of $1254.25 which became due and owing on such contract of insurance on the 1st day of November, 1917, but the said defendant has failed to pay the said sum or any part thereof and in that behalf denies total liability on said application and contract of insurance and bases its denial of liability on the grounds that said application of insurance and premium so paid was not accepted 15
by the defendant and this plaintiff further alleges that the conditions and stand of said crops at the time of the signing of said application for insurance and the inception of the said contract of insurance was fully known and accepted by the defendant and its agent and representative and the defendant entered into said contract of insurance with full notice and knowledge of the conditions existing at the inception thereof, and failed to reject the said application of insurance against hail within twenty-four hours after its receipt by the said agent of the said defendant, and held the same in its possession and custody until July 18, 1917 without any notice or refusal of acceptance whatever given to the plaintiff and until long after such damage and loss by hail had been had by the plaintiff, therefore, pursuant to Section 4902 of the Compiled Laws of the State of North Dakota for 1913 which provides as follows:

"Every insurance company engaged in the business of insur-

ing against loss by hail in this state, shall be bound, and the
16 insurance shall take effect from and after twenty-four hours from the day and the hour the application for insurance has been taken by the authorized local agent of said company, and if the company shall decline to write the insurance upon receipt of the application, it shall forthwith notify the applicant and agent who took the application, by telegram, and in that event, the insurance shall not become effective, Provided, that nothing in this article shall prevent the company from issuing a policy on such application and putting the insurance in force prior to the expiration of said twenty-four hours."

And by reason thereof and in compliance with said law is estopped, by such knowledge and notice, from asserting as a defence against liability that said application had not been accepted by the company nor the contract approved or entered
17 into thereby.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Twelve Hundred Fifty-four & 25-100 Dollars ($1254.25) with interest thereon at the rate of 6% per annum from the 1st day of November, 1917, together with his costs and disbursements in this action.

WM. G. OWENS,
Attorney for Plaintiff,
Williston, No. Dakota.

(Duly Verified.)

EXHIBIT ONE (Also Exhibit A.)

Application will be returned unless both "Original" and "Duplicate" properly executed are forwarded to com-
18 pany in same mail.

Original

Number A200

Premium $140.00 Amount insured $1400.00

Capital and Surplus $1,750,000.00
Assets over $4,400,000.00

Application for Crop Insurance
to the
National Union Fire Insurance Co.
of Pittsburgh, Pa.

I, Robert Wanberg of Tioga, P. O. County of Williams, State of No. Dak., hereby make application for insurance to take effect from the day this application is received and accepted, as evidenced by the issuance of a policy thereon, at the Waseca, Minnesota Agency for said Company, and to end on the 15th day of September, 1917, upon growing crops against loss, dam-

age or failure from hail or any other cause except fire, floods, winter kill or failure on my part to properly prepare the ground for seeding and properly seed, care for, harvest, protect and thresh said crop during the crop season of 1917 to the amount of Fourteen Hundred Dollars, and in no case shall the Company be liable for more than $7.00 per acre for an entire interest in the crop so insured when the destruction or failure of said crop is total, but if the destruction or failure of said crop is partial only, then the amount of damage shall be determined as hereinafter set forth. 10

The crop to be insured consists of 200 acres of small grain of which I own an entire interest or 200 acres, all situated in the County of Williams, State of No. Dak. and described and diagramed as follows:

(Insert)

(Here follows sectional diagram of lands cropped, with items designated.) 20

I certify that the answers to the following questions relating to the fields above described and diagramed, are true:

Are these crops all a good stand and in good condition? Answer Yes. Have they been damaged prior to this date and how? Answer No. What was their yield per acre in 1916? Answer: Not less than, Wheat 9 bushels, Flax No bushels, Rye No bushels, Oats 25 bushels, Barley 20 bushels, Speltz ..... bushels. What is your age? 42. Married? No. Did you receive less than $7.00 per acre from crops on these fields in each year in 1914, 1915 and 1916? Answer No. If you received less than $7.00 per acre in any of the years, 1914, 1915 or 1916, was the crop damaged, and from what causes? Answer ..... How many acres of this crop is on virgin sod breaking? Answer No. How many acres of this crop is on sod breaking on land previously under cultivation? Answer No. Is there Quack grass in same? Answer No. Why was it abandoned? Answer ..... What is kind and depth of soil? Black loam 18 in. Subsoil?..... Is there any gumbo, Quack grass, Russian thistle, wild oats, stone, hills, sloughs or alkali on these fields? Answer No. What is the actual value per acre of these fields, exclusive of the improvements? Answer $25.00. 21

I hereby agree that all above described grain constitute one crop and is to be insured as one whole, and is all of such crops owned by me. I further agree that crop of small grain, as herein used, includes wheat, flax, rye, oats, barley and speltz only.

I hereby guarantee the above statement of the number of acres of small grain now growing or hereafter to be planted

and grown, during the season of 1917 upon the above described land, to be true and correct, and that the same is all the small grain owned by me.

I further direct that in event of loss, insurance shall be payable to myself. In case of my failure to receive my policy within ten days from the date of this application, I agree to notify the Company by registered mail to that effect.

I hereby agree that the ground on which said crops have been, or will hereafter be planted, has been, or will be, properly plowed and prepared for seed and that the crops have been, or will be, properly seeded, cared for, protected, harvested and threshed all at the proper times and in a good and farmerlike manner and that I will do all things necessary and usual to protect same.

I further agree that in the event of the total destruction of said crop or its total failure from any cause, I will within three days after such destruction so notify said company by registered mail at its office at Waseca, Minnesota.

I agree that if said crop becomes damaged so that its value is reduced below $7.00 per acre as herein computed, that I will notify the Company thereof, and in good time to permit it to cause said crop to be viewed before same should be cut and harvested in the usual course of good farming in the community where said crop is, and I further agree that if at the time of threshing, I claim or have claimed damage to or failure of said crop, I will within three days after said threshing is completed, mail to the Company at Waseca, Minnesota, by registered United States mail a statement sworn to by myself and the thresher, giving the amount of each kind of grain threshed from said crop, and I further agree that all claims made under any policy issued to me under this application shall be sent to the Company on or before the 20th day of September, 1917, and in no event shall the Company be liable for claims after September 20, 1917.

I further agree that in the event of a partial loss of said crop the amount of damage shall be determined by computing the value of each grain, viz: Wheat One dollar per bushel, Flax, one and 75-100 dollars per bushel, Rye seventy cents per bushel, Oats, Barley and Speltz fifty cents per bushel, and the damage thereto shall be the difference between the amount for which said crop is insured and the value obtained as herein provided.

I further agree that the damage to said crop, if any, shall be ascertained by deducting the value of the entire crop, so computed as above, from the value of same at Seven Dollars per acre.

I hereby agree that the acceptance by me of the policy issued upon this application shall be an acceptance by me of 25
all the conditions therein contained, and I agree to send all notices or claims to the company by Registered U. S. Mail.

I further agree that this application and the policy issued to me, shall constitute the entire contract regarding the insurance hereby applied for.

I request that my policy be sent to Gus W. Everson, Agt. dated o'clock 10 A. M. this 12th day of July, 1917.

ROBERT WANBERG,
Applicant.

I certify that above application was read and fully understood by applicant and signed in my presence. I further certify that the above applicant has been personally known by me the past 8 years, and that he is a sober, honest, industrious and a careful and successful farmer, and that the fields above 26
described are equal in condition and fertility to the average in this locality, and crops thereon are in good condition and have not been injured at date hereof, and I recommend the acceptance of the application by the company.

GUS. W. EVERSON,
Resident agent at Tiago, State of N. Dak.

ROBERT WANBERG,
Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, of Pittsburgh, Pa., a foreign insurance corporation,
Defendant. 27

ANSWER.

Defendant above named, as and for its answer to the complaint of plaintiff herein:

I.

1. Admits that at all times mentioned in plaintiff's complaint defendant was, and still is, a corporation duly created, organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, having its principal place of business in the city of Pittsburgh in said state, and engaged in insuring property interests and rights against loss and damage by fire and other hazards, including, during the time mentioned in said complaint, the hazards specifically mentioned in Paragraph I of the complaint; and further admits that during all of the times mentioned in said complaint, prior to on or about February 1st, 1918, defendant was admitted and authorized to transact its corporate business in the state of North Dakota.

2. Further answering defendant alleges that it is not pos-
28 sessed of knowledge or information sufficient to form a belief as to whether plaintiff was in possession of or farmed the land described in Paragraph II of plaintiff's complaint, or whether plaintiff was the owner of, or had an insurable interest in, the crops grown during the year 1917 on said premises in said Paragraph described, and therefore denies the same.

3. Admits that on July 16th, 1917, this defendant received at its branch office at Waseca, Minnesota, an application,—in form substantially corresponding with "Exhibit A" attached to plaintiff's complaint,—purporting to have been signed by the above named plaintiff at 10 o'clock A. M. on the 12th day of July 1917, but which said application this defendant alleges was not executed and signed by the said Robert Wanberg until subsequent to 7 o'clock on the evening of July 14th,
29 1917.

4. Further answering defendant alleges that said application was accompanied by certain other applications of similar tenor purporting to have been executed by divers other persons on said 12th day of July 1917, and was also accompanied by a certificate of deposit issued by Tioga State Bank of Tioga, North Dakota, numbered 2775, in the amount of $945.46; said amount representing the aggregate net premium on the several policies applied for in and by said applications, after deducting therefrom the commission of the local agent of said defendant at Tioga, North Dakota.

5. That on the 17th day of July, 1917, this defendant returned by mail, postage prepaid, to Gus W. Everson, at Tioga, North Dakota (said Everson, prior to the 11th day of July,
30 1917, being defendant's local agent at that point for the sole purpose of soliciting business and procuring applications for this defendant and for no other purpose and invested with no other authority) all of said applications so received by said defendant on July 16th 1917, at its Waseca office as aforesaid, together with said certificate of deposit,—stating to said Everson that defendant was returning said applications and said certificate of deposit for the reason that it had ceased writing that class of insurance for the season of 1917, and further advising Everson that it did not care to ssume any further risks in that vicinity.

6. Further answering defendant alleges that under date of August 1st, 1917 the said Gus W. Everson returned to this defendant, by mail, the several applications and the certificate of deposit hereinbefore mentioned and referred to, and that on August 4th, 1917, said applications and said certificate of deposit were again by this defendant returned to the said Gus

W. Everson by mail, postage prepaid, and that this defendant has never since seen said applications or said certificate of deposit, or received any other applications for insurance from any of said parties, or received, in any manner or form whatsoever, any premium for any applications of any kind or nature whatsoever from any of said parties.

7. Specifically denies all and several the allegations set forth and contained in Paragraphs IV, V, VI, VII, VIII and X of plaintiff's complaint.

8. Further answering defendant alleges that it is not possessed of knowledge or information sufficient to form a belief as to whether plaintiff had and carried other policies of insurance on the crops situate on the land described in Paragraph II of plaintiff's complaint, and therefore denies the allegations to that effect contained in Paragraph IX of plaintiff's complaint.

9. Further answering defendant admits that this plaintiff has demanded and caused to be demanded of defendant the payment of the sum of $1254.25, and admits that said defendant has at all times failed to pay said sum or any part thereof, and has at all times denied all and any liability whatsoever to this plaintiff in any sum whatsoever to and for any reason or upon any account whatsoever.

10. Further answering defendant alleges that it is not possessed of knowledge or information sufficient to form a belief as to whether the said Gus W. Everson, the representative of this defendant who endorsed said application, was conversant with the condition of plaintiff's said crops at the time of signing of the said application, and therefore denies the same; and defendant further alleges that it had no knowledge whatsoever relative to the condition of said crops at the time of the signing of said application, other than as set forth and described in said application. And defendant further alleges that if the said representative of this defendant, who countersigned and endorsed said application, was aware, at the time of making said endorsement, that any of said crops were not of good stand and in good condition, but had in fact been damaged prior thereto, then that plaintiff herein and said representative of defendant fraudently and unlawfully combined and confederated for and with the sole intent, purpose and design of committing a fraud upon this defendant by attempting to induce it to issue and deliver to plaintiff herein a policy to

which said plaintiff was not entitled, and assuming a risk other 34 than the one represented to it by said application.

11. Further answering defendant denies each and every allegation, matter and thing in said complaint set forth and alleged, save and excepting such as are hereinbefore admitted, qualified, or specifically denied.

12. Further answering, defendant repeats and realleges all and several the allegations and matters set forth and contained in Paragraphs 1 to 11, both inclusive, of this amended answer, and makes the same part hereof as though set forth herein in full.

13. Further answering, and as and for a first affirmative defense herein, defendant alleges that said application, hereinbefore and in plaintiff's complaint mentioned and referred to, 35 expressly provided that it should take effect from the day it was received and accepted, as evidenced by the issuance of the policy thereon, at the Waseca, Minnesota, Agency for said defendant.

14. Further answering defendant alleges that neither said application, nor any other application whatsoever of said plaintiff, was ever accepted by this defendant, or any policy contract whatsoever of this defendant ever issued to said plaintiff upon any application, or otherwise. And defendant further alleges that in so far as Section 4902 of the Compiled Laws of North Dakota, 1913, in anywise tends or operates to control, avoid or nullify the provision and condition of said application, hereinbefore and in the preceding paragraph alleged and referred to 36 said Section 4902 expressly operates in depriving this defendant of liberty or freedom to contract, in depriving this defendant of property without due process of law, in denying to this defendant the equal protection of the laws, and, further, is unreasonable in its requirements, and for each and all of the reasons last enumerated is repugnant to and in violation of the 13th Section of Article I of the Constitution of the State of North Dakota, and the 14th Amendment of the Constitution of the United States.

III.

15. Further answering, and as and for a second affirmative defense herein, defendant repeats and realleges all and several the allegations and matters set forth and contained in Para-

graphs 1 to 11, both inclusive of this amended answer, and makes the same a part hereof as though set forth herein in full.

16. Further answering, defendant alleges that plaintiff herein, by the act of making and signing said application, expressly and wholly waived all and several the provisions and conditions embodied and set forth in said Section 4902 of the Compiled Laws of North Dakota, 1913.

IV.

17. Further answering, and as and for a third affirmative defense herein, defendant repeats and realleges all and several the allegations and matters set forth and contained in Paragraphs numbered 1 to 11, both inclusive, of this amended answer and makes the same part hereof as though set forth herein in full.

19. Further answering defendant alleges that said application contained, among other things, an agreement and promise on the part of the applicant that if the crop thereby sought to be insured became damaged so that its full value was reduced below $7.00 per acre as in said application computed, said applicant would notify defendant thereof in good time to permit defendant to cause said crop to be viewed before the same should be cut and harvested, and defendant alleges in this respect that prior to September 19th, 1917, this defendant was never in anywise or in any manner notified, by the plaintiff in this action or any other person, of the fact of any damage whatsoever having occurred to any of the crops raised or grown upon the land described in Paragraph II of plaintiff's complaint.

V.

19. Further answering, and as and for a fourth affirmative defense herein, defendant repeats and realleges all and several the allegations and matters set forth and contained in Paragraphs 1 to 11, both inclusive, of this amended answer, and makes the same part hereof as though set forth herein in full.

20. Further answering defendant alleges that in said application for said policy plaintiff herein represented and stated, among other things, that at the time of making said application plaintiff's said crops were all a good stand and in good condition and had not been damaged prior to the making of

said application, and that plaintiff covenanted and agreed that the acceptance by him of any insurance issued upon said application should be an acceptance by him of all the conditions and requirements set forth and contained in the policy thus applied for, and that in case any of said statements made by plaintiff in said application were untrue, then said insurance, at the election of defendant, should become null and void.

21. Further answering, defendant alleges that under and by virtue of the express terms and conditions of said application if any insurance was affected thereunder the same was rendered wholly and absolutely void in this, to-wit:

That at the time of making and signing of said application by plaintiff herein, the crops therein mentioned and referred to were not all a good stand and were not in good condition; on the contrary, that at the time of making and signing of said application by plaintiff certain, if not in fact all, of plaintiff's said crops were materially, seriously and noticeably injured and damaged by drought and other causes and were not of good stand, all to the knowledge of plaintiff at the time of making and signing said application; of all and several of which said conditions defendant was at all times wholly ignorant.

VI.

22. Further answering and as and for a fifth affirmative defense herein, defendant repeats and realleges all and several the allegations and matters set forth and contained in Paragraphs 1 to 11, both inclusive, of this amended answer, and makes the same part hereof as though set forth herein in full.

23. Further answering defendant alleges that the policy contract applied for by plaintiff provides, among other things, that any misrepresentation, or fraud, or concealment, or false swearing by the assured relative to any matter touching said insurance, or the amount or cause of any loss or damage or failure to any insured crop, should be a full satisfaction and discharge of defendant from all liability by virtue of said policy and should be a complete bar to all remedies thereon.

24. Further answering defendant alleges that if any insurance was effected upon and under said application of plaintiff herein the same was rendered wholly and absolutely void and plaintiff is estopped from demanding any relief thereunder and barred from all remedies thereon in this, to-wit:

That at the time of the making and signing of said applica-

ion by plaintiff herein plaintiff knowingly and willfully represented that at the time of making said application plaintiff's said crops were all a good stand and in good condition and had not been damaged prior to the making of said application; whereas, in fact, at the time of the making and signing of said application certain, if not all, of plaintiff's said crops were materially, seriously and noticeably damaged and injured by drought and other causes and were not of good stand, all to the knowledge of plaintiff at the time of making and signing said application, and that plaintiff then and there knowingly misrepresented to, and concealed from this defendant, the true condition of said crops for and with the fradulent intent, purpose and design of inducing this defendant to issue and deliver to the plaintiff its said policy contract; of all and several of which said conditions and circumstances defendant was at all times wholly ignorant.

VII.

25. Further answering, and as and for a sixth affirmative defense herein, defendant repeats and realleges all and several the allegations and matters set forth and contained in Paragraphs 1 to 11, both inclusive, of this amended answer, and makes the same part hereof as though set forth in full.

26. Further answering defendant alleges that the policy contract applied for by plaintiff provides, among other things, that in the event the assured claims damages by reason of partial destruction or partial failure of said crops he shall, within three days after threshing said crops, mail, to defendant by registered United States mail, duly addressed to said defendant at its Waseca Office, Minnesota, a statement, sworn to by the assured and the thresher, giving the number of bushels of each kind of grain threshed from said crops so insured, and further provides that no suit or action on said policy, for the recovery of any claim, should be sustainable in any court of law or equity until after full compliance by the assured with all of the foregoing requirements.

27. Further answering defendant alleges that if any insurance was effected upon or under said application of plaintiff herein the same was rendered wholly and absolutely void and plaintiff is estopped from demanding any relief thereunder and barred from all remedies thereon in this, to-wit:

That no statement, giving the number of bushels of each

46 kind of grain threshed from the crops so claimed to be insured, and sworn to by the assured and the thresher, or by either thereof, was ever mailed to or received by, this defendant.

WHEREFORE, Defendant prays that plaintiff take nothing by this action, and that defendant have its costs and disbursements in this action.

Dated March 15, 1919.

BARNETT & RICHARDSON,
Attorneys for Defendant,
12-14 First Nat. Bank Bldg.,
Fargo, North Dakota.

NATHAN H. CHASE,
Minneapolis, Minn.
Of Counsel.

47 (Duly Verified.)

~~Wherefore defendant prays that plaintiff take nothing by this action, and that defendant have its costs and disbursements in this action.~~ 43

~~Dated June 19, 1918.~~

~~BARNETT & RICHARDSON,~~
~~Attorneys for Defendant,~~
~~Fargo, North Dakota.~~

(Duly verified.)

STATE OF NORTH DAKOTA, IN DISTRICT COURT,
ss.
County of Williams. Eleventh Judicial District.

ROBERT WANBERG,
Plaintiff,
vs. 44
NATIONAL UNION FIRE INSURANCE COMPANY of Pittsburg, Pa., a foreign corporation, Defendant.

LARSON FRETLAND,
Plaintiff,
vs.
NATIONAL UNION FIRE INSURANCE COMPANY of Pittsburg, Pa., a foreign corporation, Defendant.

OLAUS HERFINDAHL,
Plaintiff,
vs.
NATIONAL UNION FIRE INSURANCE COMPANY of Pittsburg, Pa., a foreign corporation, Defendant. 45

GURENA SATHER, as administratrix of the estate of PETER J. SATHER, deceased, Plaintiff,
vs.
NATIONAL UNION FIRE INSURANCE COMPANY of Pittsburg, Pa., a foreign corporation, Defendant.

STIPULATION.

The above entitled actions being regularly and duly on the calendar of causes for jury trial at the regular June, 1919 term of the above court in and for Williams County and whereas the said causes are of similar nature and involve like facts, and questions of law decided in one will eventually determine the law of all said cases and it having been so agreed between counsel,

46 IT IS HEREBY STIPULATED by and between the respective attorneys for said parties to said actions,

1. That the case wherein Robert Wanberg is plaintiff shall be tried to the court without a jury, jury being hereby waived, and a final determinaton of said action shall be considered a determination of each of the other cases, but that the other above entitled actions shall stand to abide such final determination, excepting that in event said action shall be finally determined in favor of the said plaintiff, Wanberg, then the other said actions shall be determined in favor of the said respective plaintiffs with damages in their favor as demanded in their respective complaints, and orders and judgments entered according, this stipulation applying in full effect in each of said actions.

Dated this 18th day of July, 1919.

47 WM. G. OWENS,
Attorney for the Plaintiff,
BARNETT & RICHARDSON,
Attorneys for Defendant.

STATE OF NORTH DAKOTA, IN DISTRICT COURT
ss.
County of Williams. Eleventh Judicial District.

ROBERT WANBERG,
Plaintiff,
vs.
NATIONAL UNION FIRE INSURANCE COMPANY, of Pittsburgh, Pa., a foreign corporation,
48 Defendant.

STIPULATION OF FACTS.

For the purpose of trial of the above entitled action it is hereby admitted, stipulated and agreed, that the following facts stand as admitted as proven and true:

1. That during all the time mentioned in the complaint herein the plaintiff was the owner and in possession of all and several the lands mentioned and described in Exhibit "A" of said complaint and was possessed of an insurable interest in the growing crops thereon during the year 1917 to the extent stated and set forth in Exhibit "A" attached to said complaint.

2. That plaintiff made and delivered to Gus W. Everson the application referred to in plaintiff's complaint as Exhibit "A", in duplicate, and at that time paid to the said Gus W. Everson the premium called for and specified in said Exhibit "A"

3. That at that time and on the 12th day of July, 1917 the said Gus W. Everson was the local agent of defendant insurance company at Tioga, in the State of North Dakota, and then and there duly authorized and empowered by the defendant to solicit, take and receive said application for insurance and the premium therewith.

4. That on that day and prior to receiving said application from the plaintiff the said agent of defendant company carefully examined the growing crops described and mentioned in plaintiff's application for insurance and so certifed which certificate was attached to the said application.

5. That at the time plaintiff made and delivered to Gus W. Everson the application referred to in plaintiff's complaint said plaintiff's crops therein described had been in all things properly sowed, cared for and protected and were in all respects as stated and represented in such application.

6. That on the 13th day of July, 1917 and in the afternoon of said day the said Gus W. Everson, said agent, forwarded plaintiff's said application, with others, and a draft or remittance for the premiums therefor to the defendant at its Waseca, Minnesota office which was received and noted at defendant's said office on the morning of July 16, 1917.

7. That the growing crops described in such application were damaged and destroyed by hail. That thereafter and within the time designated in such application plaintiff notified defendant company by registered mail addressed to defendant's Waseca, Minnesota office of such loss and the extent thereof as required in such application and did thereafter care for the balance of such crops in a good and husbandlike manner and according to the best of his ability and harvested and threshed the same and thereby saved and harvested from said lands a crop of the value of $145.75 computed according to the conditions and prices set forth in said application.

8. That subsequent to harvesting and threshing same plaintiff did on the 17th day of September, 1917 mail to defendant by United States registered mail with postage prepaid addressed to its Waseca, office and agency a statement giving all information regarding number of bushels of each kind of grain so threshed from such crops which statement was signed and sworn to by plaintiff and the thresher, plaintiff having in accordance with conditions of such application prior thereto notified defendant of his loss by reason of such hail.

9. That the damage and loss of plaintiff and hereinbefore referred to was not occasioned by or occurred from any of the causes excepted in the said application.

10. That upon receipt of such application of plaintiff by the defendant at its Waseca office or agency the defendant did

not notify plaintiff by telegram that defendant refused to ap-
52 prove same or that defendant rejected such application.

11. That plaintiff's damage by reason of such loss by hail is the sum demanded in plaintiff's complaint and if ultimately and finally defendant be adjudicated liable therefor in this action such liability shall be in the sum alleged and demanded in plaintiff's complaint.

12. That the original application herein referred to as Exhibit "A" of plaintiff's complaint shall be received in evidence.

13. That at all times mentioned in the complaint defendant company was a foreign corporation as alleged, authorized and doing business within the State of North Dakota under the insurance laws of this State.

14. That on July 17, 1917, the Waseca, Minnesota agency of defendant returned, by mail postage prepaid, plaintiff's said
53 application with the other applications and the draft or remittance in paragraph 6 of this stipulation referred to, to said Gus W. Everson, stating that said applications (including that of plaintiff) would not be accepted by defendant company.

15. That plaintiff had no hail insurance on such crops excepting as applied for in said Exhibit "A".

Dated at Williston, North Dakota this 18th day of July 1919.

WM. G. OWENS,
Attorney for Plaintiff.
BARNETT & RICHARDSON,
Attorneys for Defendant.

(Filed in the office of the Clerk of the District Court of Williams County, North Dakota July 21, 1919, J. O. Sibert,
54 Clerk of the District Court, Williams Co., N. D.

ROBERT WANBERG,

called as a witness in behalf of plaintiffs, and being duly sworn testified as follows:

Direct Examination by Mr. Owens:

Q. What is your name?

A. Robert Wanberg.

Q. Where do you live, Mr. Wanberg?

A. Tioga.

Q. What is your business?

A. Farming.

Q. In 1917 were you during the month of July one of the parties that was living on a farm down there, living on your farm down there near Tioga?

A. Yes.

Q. Were you affected by the hail storm?

A. Yes.

Q. You had made an application that is referred to in this 55
action and stipulations for hail insurance with this defendant company?

A. Yes.

Q. And that application was given to whom?

A. Gus Everson.

Q. That is Gus W. Everson?

A. Yes.

Q. That is the party that is referred to in this action as agent for the defendant company?

A. Yes.

Q. Where was that application signed?

A. Out on the farm.

Q. On your farm?

A. Yes. 56

Q. I show you Exhibit One which is referred to in the complaint in this action as Exhibit A and ask you if that is the applicaton that you signed at that time?

A. Yes, that is what it is.

Q. Exhibit One is?

A. Yes.

Q. Who was present at the time that you signed this application?

A. Nobody there except me and him.

Q. When you say "him" you mean who?

A. Gus Everson.

Q. Do you know what day that was signed?

A. On the twelfth day of July.

Q. Twelfth of July, 1917? 57

A. Yes.

Q. At what time of the day?

A. It was in the forenoon.

Q. It was in the forenoon?

A. Yes.

Q. Was the hour that it was signed put in the application by yourself or by whom?

A. By him.

Q. By Mr. Everson?

A. Yes.

Q. Then you signed it?

A. Yes.

Q. Do you remember exactly the hour yourself?

A. No, I couldn't say just exactly the hour; all I can say I hadn't had my dinner and had unhitched from the work I was doing out on the farm.

58 Q. Now, he took the application with him, did he?
A. Yes.
Q. You had a loss by hail—your crop was destroyed, was it?
A. Yes.
Q. Was you home when the hail struck you?
A. Yes, I was right in the house when the hail started.
Q. What day was it that the hail—that this storm struck you?
A. On the fourteenth of July.
Q. That same month?
A. Yes.
Q. And that was in 1917?
A. Yes.
Q. Do you know what time of the day it was that the hail struck it?
59 A. Some minutes over six o'clock in the evening.
Q. A few minutes over?
A. A few minutes over.
Q. You mean by that a few minutes after six o'clock?
A. Yes.
Q. Was you completely hailed out?
A. On the homestead I was completely hailed out, but on the other land it wasn't so badly cut down as on the homestead
Mr. Owens: Exhibit One is offered in evidence.

CROSS EXAMINATION.

By Mr. Barnett:
Q. Mr. Wanberg, just look at that signature there, is that yours?
60 A. Yes.
Q. You signed that paper?
A. Yes.
Q. Now, that paper was made out by whom?
A. By Gus Eversion.
Q. Down at your place south of Tioga?
A. Yes.
Q. On the day that you signed it, was it?
A. Yes, the same day.
Q. And at about the hour mentioned in this paper? You see the hour that is mentioned there, is that right?
A. Well, I didn't look on the watch—he put down the hour himself—it was in the forenoon.
Q. You saw him put it down?
A. Yes.
Q. And at that time you were satisfied that it was about that time?
A. Yes.

Q. Now, I see on this paper there are certain check marks here or certain spaces marked off. What do those indicate? In other words, do they indicate the land that you had into crop?

A. Yes.

Q. In both of those squares appearing here?

A. Yes.

Q. And you gave that information to Mr. Everson?

A. Yes.

Q. And as you gave it to him he marked it down on the plat?

A. Yes.

Q. Now, look, at that plat and see if that is correct, the description of your land that you were intending to insure?

A. That is correct as far as I can say.

Q. You were satisfied that Mr. Everson marked this land off as you gave it to him at that time?

A. Yes.

Q. And the land that appears to be marked off on this plat was the land covered by the different crops?

A. Yes.

Q. That you had sown and owned at that time, is that correct?

A. Yes.

Q. Now, here, Mr. Wanberg, are certain figures, as follows: 104 acres of wheat—was that correct?

A. Yes, that is correct.

Q. And 14 acres of flax?

A. Yes.

Q. No rye?

A. No, sir.

Q. 52 acres of oats?

A. Yes.

Q. 30 acres of barley?

A. Yes, that is correct.

Q. And no speltz?

A. No, sir.

Q. Those figures represent the acres of different kinds of grain were given by you to Everson and he put them down here correctly, didn't he?

A. Yes.

Q. And you knew that they were correct at the time you signed this paper?

A. Yes, I ought to know.

Q. Are you sure, Mr. Wanberg, that this paper bears the actual date that you signed it?

A. I am.

64 Q. What day of the week was it?

A. It was hailed out on Saturday evening—it was on the fourteenth, and this was on the third.

Q. It wasn't on the thirteenth that you signed it?

A. No.

Q. You are sure about that?

A. Oh, yes.

Q. Now, at the time you signed this paper, Exhibit One, did you have any other transaction with Mr. Everson?

A. No.

Q. Nothing?

A. No.

Q. Did you pay him for this insurance that time?

A. I made out a note to him.

65 Q. You made out a note to him?

A. Yes.

Q. Do you remember how much that note was?

Mr. Owens: Object to the cross examination of the witness with reference to the payment of the premium on the ground that it is admitted and stipulated that the premium was paid.

Mr. Barnett: It is for another purpose; I don't question the fact, but it is for another purpose than to show that it was not.

The Court: Overruled.

A. A hundred and forty dollars.

Mr. Barnett:

Q. Later in the fall that note was returned to you, was it not?

66 A. Well, he came out—

Q. (Interrupting). Well, was it, or was it not returned to you?

A. No, the note wasn't returned to me before I settled for it in the fall.

Q. Did you pay any money for that note?

A. I have.

Q. How much did you pay?

A. I renewed the note.

Q. You renewed it?

A. Yes.

Q. Have you paid the renewal note?

A. The old note?

Q. No, the renewal note—you say you renewed the first note—have you paid the renewal note?

A. I have a part of it; I am not sure if I paid it all.

Q. To whom did you pay that? 67
A. Tioga State Bank.
Q. After you had signed this Exhibit One, this paper we have just been talking about, the application, to whom was it delivered? Who did you give it to?
A. I gave it to Gus Everson.
Q. When did you next see it?
Objected to as incompetent, irrelevant and immaterial, admitted under the pleadings that this application, if it is for the purpose of impeaching evidence—
Mr. Barnett: Not at all.
Mr. Owens: It is admitted that this application, by the stipulation, was received.
Mr. Barnett: No question about it. There is also mentioned there that the company on the seventeenth day of July 68
returned the application and the message and I want to trace this application.
The Court: Overruled.
(The question is read).
Mr. Barnett:
Q. —(Continuing). After you had signed it and delivered it to Everson?
A. I haven't had a chance to see it since.
Q. You haven't seen it since?
A. No.
Q. Do you know how it got into the posesssion of your counsel?
A. Got it into his possession by the mail.
Q. Who sent it through the mail, if you know? 69
A. I think it was one of Langer's lawyers in Bismarck, I don't remember his name.
Q. How did it get to Langer or his lawyers in Bismarck?
A. It was ordered there by the mail.
Q. What do you mean by that, Mr. Wanberg?
A. It was ordered there by the mail because we was asking him questions what to do with it.
Q. Did you ask Mr. Langer some questions about it?
A. We wrote to him about it.
Q. Where did you get this paper in order to send it to Mr. Langer—where did you get it?
A. It was in Gus Everson's possession and he was supposed to send it, so far as I know.
Q. Mr. Everson advised you that this paper had come back from the company and they refused to write this insurance, didn't they—isn't that a fact? That is true, isn't it?

A. Yes.

70 Q. And then Mr. Everson, at your request, sent this to Langer, the attorney general?

A. Yes.

Q. Well, now, about what time was it that this paper was sent to Mr. Langer?

A. I couldn't tell because I didn't put it into my mind.

Q. Well, about—I don't expect you have got the exact date, but as near as you can remember.

A. It was out in the fall, but I can't place the time what time it was.

Q. When it was returned did it come back to you or to Mr. Everson, if you know, from Attorney General Langer?

A. No, it was sent by the mail to Williston here.

71 Q. To Mr. Owens? If you know.

A. I wouldn't say for sure; I don't remember.

RE-DIRECT EXAMINATION.

By Mr. Owens:

Q. When was it that you first knew that the company refused to write a policy on this application—who told you that?

A. Well, I didn't know it before Gus Everson came out there with the papers and wanted us to take them back.

Q. Did he have this paper or other papers?

A. He didn't show us any paper; he said our papers was back if we wanted them.

Q. And did you refuse to take them back at that time?

Objected to as leading and suggestive.

Mr. Owens: Withdraw the question.

72 Q. What did you say?

A. I said we didn't want to take them back before we have to.

Q. Was that before or after you were hailed out?

A. It was after I was hailed out.

Q. Now, was this matter of the company refusal to write a policy taken up with the insurance commissioner of this state, do you know?

A. No, sir.

Q. Wasn't these papers sent down to the attorney general for the insurance commissioner—do you know anything about that?

A. No, I don't know.

Q. All you know was that Everson sent the papers to the attorney general?

A. Yes.

Q. But you never had this application, you never got it back?

A. No.

Q. Counsel asked you about whether or not you signed any other papers at the time. I will show you Exhibit Two. You told him you gave Everson a note. I will show you Exhibit Two and ask you if that is the note you referred to?

A. That is the one.

Q. That is the one that you gave Everson for the premium?

A. Yes.

Q. And where did you get this note?

A. I got it in Tioga State Bank.

Q. And at the time you say you paid it?

A. Yes, sir.

Mr. Owens: We offer in evidence Exhibit Two.

Mr. Barnett: No objection.

RE-CROSS EXAMINATION.

By Mr. Barnett:

Q. Did you pay that note?

A. No.

Q. —or did you simply make another note in place of it?

A. I gave the note, but I owed the Tioga State Bank more than this note calls for, so I don't remember, but I think I paid a part of that note and the rest was given another note and mortgage for.

Q. But this note wasn't paid at that time? It was renewed by another note, is that true? You didn't pay the bank any money when they gave you this note back and signed the other one?

A. I paid some money.

Q. How much did you pay at that time?

A. I couldn't say.

RE-DIRECT EXAMINATION.

By Mr. Owens:

Q. I don't understand that, what you said you paid some money and the rest you said you put in another note.

A. I had different figuring with the State Bank, and other business, so that note was figured in on the same thing and the amount standing left there in the bank was made out another note for the mortgage.

Q. You made a settlement with the bank on some notes you had?

A. I made a settlement with the bank on that note.

Q. And this note was included in your settlement?

A. Yes.

Q. And you paid part money and the rest was fixed up as you say with another note and mortgage?

A. Yes.

76 Q. Have you paid any of that renewal note? Have you fixed that one up too?

A. It isn't due before next fall.

RE-CROSS EXAMINATION.

By Mr. Barnett:

Q. Can you tell us the date that you got this note from the bank, this Exhibit Two?

A. I can't now.

Q. Can you give us about the time?

A. No, not now.

Q. Can't you tell us within a month or two of when you got it back?

A. Well, the last part of this winter.

77 Q. Last winter, the winter of eighteen and nineteen?

A. Yes.

Q. That is your best recollection?

A. Yes.

RE-DIRECT EXAMINATION.

By Mr. Owens:

Q. Did the bank stamp the note when you got it back?

A. Yes.

Q. Is that the stamp that is on it now?

A. That is the stamp that is on it.

Q. And does that show about the date you got it or paid it?

A. I suppose so.

Q. You think it does?

A. Yes.

78 Q. So far as your memory is concerned you don't mean to say that it was just this morning?

A. No.

Q. Mr. — Attorney asked you if it was the winter of eighteen and nineteen. Do you mean it was this last winter or the winter before?

A. No, I mean this last winter.

Q. 1919?

A. Yes.

Q. Let me show you the exhibit (hands witness the exhibit), and will you look at it and refresh your memory by the stamp on there as to whether or not that stamp is correct?

A. That stamp is correct, it is the stamp that was on it when I got it back.

Q. You have had the note in your possession ever since you got it back?

A. Yes.

Q. Until you turned it over here in the lawsuit?
A. Yes. 79

A. A. FOLDEN,

called as a witness for the plaintiff, and being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Owens:

Q. Where do you live, Mr. Folden?
A. I live at Tioga, two miles and a half from Tioga.
Q. What business are you in?
A. Farming.
Q. Do you know the land of Robert Wanberg?
A. Yes, sir.
Q. How far do you live from that land?
A. Well, I live about five miles from Wanberg's. It is his 80 homestead.
Q. Do you remember the time of the hail storm in 1917?
A. Yes, sir.
Q. —that has been referred to?
A. Yes.
Q. When did that hail storm take place?
A. On Saturday the fourteenth of July.
Q. At what time of the day?
A. That I couldn't say exactly, but it was in the evening, it was anyhow six o'clock.
Q. But just exactly the hour you couldn't say?
A. No, I wouldn't because I know it was six o'clock anyhow.
Q. Do you know whether or not this storm that you refer 81 to was the one that destroyed Mr. Wanberg's crop?
A. I wasn't there, but I went down to see it on Sunday, the next day.
Q. Did you look over the field?
A. I went along the road, between those fields that was hailed out.
Q You saw that his crop was hailed out?
A. Yes, sir.
Q. You know there was a hail storm about that time?
A. Yes, sir.

MONS ANTONSON,

82 called as a witness for the plaintiff, and being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Owens:

Q. Where do you live, Mr. Antonson?

A. I live on a farm down at Tioga.

Q. That is your business, is it, farming?

A. Yes.

Q. How far do you live from Robert Wanberg?

A. It is two miles and a half, that is, I go east half a mile and north two miles.

Q. Do you remember the hail storm in 1917?

A. Yes, sir.

83 Q. You remember what day that was?

A. It was on Saturday the fourteenth day of July.

Q. About what time of the day?

A. Well, I don't know exactly, but six o'clock, or somewhere around there.

MR. ROBERT WANBERG,

re-called for further re-cross examination, testified as follows:

RE-CROSS EXAMINATION.

By Mr. Barnett:

Q. You never received a policy on this application from this company, did you?

A. No, I haven't.

RE-DIRECT EXAMINATION.

By Mr. Owens:

84 Q. Do you remember what day of the week it was or what date of the month it was that Gus Everson came out and told you that the company wouldn't write you a policy?

A. It was either on the eighteenth or nineteenth.

Q. Either on the eighteenth or nineteenth of July?

A. Yes.

Mr. Owens: We ask the Court to take judicial notice of the fact that July fifteenth 1917 was on Sunday, and also ask the Court to take judicial notice for the purpose of the issues in this case of Section 4902 of the Compiled Laws of the State of North Dakota for 1913.

Mr. Owens: We offer in evidence, of course, all of the stipulation hereinbefore referred to and now before the Court which we will ask to be read into the record, the stipulation of facts we have entered into this day and filed in this Court.

Mr. Owens: Plaintiff rests.

Mr. Barnett: Plaintiff having rested, now comes the defendant and moves the Court to dismiss this action upon the 85
grounds following: First, that it affirmatively appears that there is no policy of insurance issued by defendant herein to the plaintiff under his application. Second, upon the ground that the application provides the following conditions: "I, Robert Wanberg of Tioga Post Office, County of Williams and State of North Dakota, hereby make application for insurance to take effect from the date this application is received and accepted as evidenced by the issuance of a policy thereon at the Waseca, Minnesota Agency of said company".

The Court: I will deny the motion at this time.

DEFENDANT'S CASE. 86

H. V. SMITH,

called as a witness for the defendant, and being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Barnett:

Q. Your name is H. V. Smith?

A. Yes.

Q. You reside in Williston?

A. Yes, sir.

Q. Have resided here for some years?

A. Twenty-nine years.

Q. You were then residing here during the years 1912 87
13, and 14?

A. Yes, sir.

Q. And during those years what were your employment or business?

A. I did a real estate business, insurance business and so forth.

Q. Will you tell us whether or not you were writing insurance for this defendant National Union Insurance Company of Pittsburg during those years?

A. To the best of my knowledge I was in 1913.

Q. Do you recollect about the year 1912?

A. Well, I can't just recall; I know they had a good crop here.

Q. I am not speaking about the crop—whether or not you were writing insurance during that period for this ompany?

A. Yes.

Q. And subsequent to 1913 were you writing for them?

A. I think I continued with that company up to from about
88 1910 up to maybe 1914.

Mr. Owens: Move to strike out the testimony of this witness with reference to his agency of the defendant, under his testimony, for the reason it is incompetent, irrelevant and immaterial, not within the issues of this case and being too remote from any of the facts placed at issue herein.

The Court: Overruled.

ERNEST BYLIN,

caled as a witness for the defendant, and being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Barnett:

Q. Your name is Ernest Bylin?

A. Yes.

89 Q. You reside where?

A. At Tioga.

Q. What is your business?

A. Banking business.

Q. How long have you been engaged in the banking business at Tioga?

A. Since 1907.

Q. During your residence there were you acquainted and have you been acquainted with this plaintiff, Mr. Wanberg?

A. Yes, sir.

Q. You have done some business with him, I presume?

A. Yes, sir.

Q. Were you also acquainted with G. W. Everson or Gus Everson?

90 A. Yes, sir.

Q. Did you do more or less business with Mr. Everson?

A. Yes, sir.

Q. You are acquainted, I suppose, with his signature and would know it?

A. Yes, sir.

Q. Your attention is now called to the signature on the back of plaintiff's Exhibit Two, and I will ask you to tell whose signature that is, if you know?

A. Mr. Everson's signature.

Q. The Gus Everson we have just been speaking of?

A. Yes, sir.

Q. I will now call your attention to defendant's Exhibit "A" and the signature attached thereto. Do you recognize that signature?

A. As far as I know, it is Gus Everson's signature.

Q. The same person whose name appears on the back of Exhibit Two? 91

A. Yes, sir.

Q. During the month of July, 1917, or thereabouts, do you recall having any business deal with Mr. Everson in relation to Exhibit—plaintiff's Exhibit Two, the note in question?

A. Yes, sir.

Q. Tell us what that deal was, Mr. Bylin.

Objected to as immaterial. Overruled.

A. I bought that note from Mr. Everson.

Q. At that time you purchased several other notes, did you not?

A. Yes, sir.

Q. Now, can you tell us, Mr. Bylin, how you paid for those notes? 92

Mr. Owens: Let the same objection stand to this line of questioning with reference to that transaction as at present, as immaterial.

The Court: Alright.

A. They were deposited to Mr. Everson's credit to the bank.

Q. Did you issue any evidence of indebtedness by the bank to Mr. Everson in payment for those notes?

A. I guess not, directly, though the proceeds of those notes were deposited to his checking account.

Q. But you issued to Mr. Everson an evidence of indebtedness in payment for those notes?

A. I did, on a deposit ticket.

Q. A "C. D.", certificate of deposit?

A. Not directly. 93

Q. Well, let us have it, what it was.

A He gaye me a check, he got a C. D. and give me a check for it against his account.

Q. At that time was his account good for the amount of money represented by the C. D.?

A. Yes, sir.

Q. And you want this Court to understand that you paid cash for those notes?

A. Yes,—well, I deposited them to his account.

Q. Well, did you pay cash?

A. I didn't pay currency, no.

Q. Did you pay any money or any consideration except the certificate of deposit?

A. I didn't issue the certificate of deposit directly against those notes. I say those notes were deposited to his account, to his individual deposit account.

Q. Did your bank issue on or about the twelfth day of July,
94 1917, a C. D. No. 2775 for $945.46?
A. I have my record here.
Q. Well, look it over and see.
A. Issued on July 13th.
Q. July 13th, 1917?
A. Yes, sir.
Q. Who was the payee of that certificate?
A. G. W. Everson.
Q. Have you that certificate here?
A. Yes (hands counsel paper).
Q. Now, can you tell us if there is more than one item entering into this gross amount of $945.46, will you tell us what it is?
95 A. Well, that item there, he gave me his personal check for that item.
Q. You credited the face of those notes to his account?
A. Yes, sir.
Q. And then he gave you his personal check for this certificate of deposit?
A. Yes.
Q. Now, can you tell me whether or not in the credit that you gave Mr. Everson's account the note of Robert Wanberg for $140 was included?
A. Yes, sir, it was.
Q. Now, Mr. Witness, there appears to be a paid stamp on this certificate of deposit. Can you tell us what the date is?
A. August 24, 1917.
96 Q. That certificate was not payable on its terms until the first day of December, was it?
A. No.
Q. Calling your attention to the endorsement upon the back. the written endorsement on the back—what is that endorsement, if you can read it?
A. "Pay to the order of the National Union Fire Insurance Company of Pittsburg, Pa., Gus W. Everson".
Q. Had this endorsement that you have just read been erased when this certificate was presented at your bank?
A. Yes, sir.
Q. Who presented to your bank this certificate?
A. Well, I don't remember the transaction, but apparently Gus Everson presented it.
Q. And on the presentation of this certificate to your bank what was the transaction?
A. He obtained a new certificate of deposit for a part of it and took up some notes with a part of it.

Q. And tell us what notes he took up?
A. The note of Theodore Svor, eighty-four dollars, and another one Theodore Svor, a hundred and five dollars, one by T. Heen $149.80, and one by A. P. Marcoux $87.50.
Q. How much does that make?
A. $426.30.
Q. How was the balance of that account adjusted?
A. In a new certificate of deposit.
Q. Have you that certificate with you?
A. Yes, sir.
Q. You say certificate No. 2804 was given to Mr. Everson fos the balance between the notes you have just described and the amount of the certificate 2775?
A. Yes, sir.
Q. This certificate was taken up by your bank, was it not, on or about the seventh of December, 1917?
A. Yes, sir.
Q. Now, what was paid in exchange for that balance or that certificate?
A. That was paid to the Farmers and Merchants Bank. Tioga.
Q. In what manner?
A. A regular exchange of checks.
Q. It didn't involve any one of these notes?
A. No, sir.
Q. You are sure of that?
A. Yes, sir.
Q. Now, when was these notes paid, if at all, Robert Wanberg notes, the $140 note?
A. May 20th, 1918.
Q. Was that paid, or was it renewed?
A. Why, it was paid in part.
Q. And renewed?
A. The balance renewed, yes.
Q. Is the renewal note paid?
A. Why, I don't remember.
Q. Don't your bills receivable tell us?
A. This bills receivable had expired at that time.
Q. It don't go back that far?
A. No.
Q. Do you know whether or not it is paid?
A. I don't believe it is paid, all of it.
Q. How much has he paid out to this date?
A. At that time there were three notes in the settlement. one note of twenty dollars and one note of $56.75 and interest

on all three amounting to $242.10, and the renewal note is
100 $138.85; it leaves $103.25 paid on the bunch.

Mr. Barnett: Exhibit A is offered in evidence.

Mr. Owens: Objected to as incompetent, irrelevant and immaterial, in no wise proves or disproves any of the issues in this case, and containing matter foreign and irrelevant to the issues, if any, joined or referred to therein, and any statement being made by Gus W. Everson to the defendant principal being not binding on this plaintiff.

The Court: Sustained. There are statements down there at the bottom that wouldn't be competent anyway.

Mr. Barnett: Well, I will cut that right out.

Mr. Owens: You haven't cut out enough. The same objection as before.

The Court: Overruled. I will allow it in.

101 CROSS EXAMINATION

By Mr. Owens:

Q. With reference to the note of Mr. Wanberg, that was received by you from Mr. Everson in the due course of business and for a consideration, wasn't it?

A. Yes, sir.

Q. And so far as the bank is concerned Mr. Wanberg made settlement or payment of this note?

A. Yes, sir.

Q. And on or about the date stamped on it?

A. Yes, sir.

Q. And in his settlement part cash was received by the bank and the balance in bills receivable?

A. Yes, sir.

102 Q. That bills receivable is still held by the bank?

A. Yes, sir.

Q. —as a claim against Mr. Wanberg?

A. Yes, sir.

Q. And you expect to enforce collection at the time it is due?

A. Yes, sir.

Q. Mr. Wanberg wasn't present at the time of these transactions between you and Mr. Everson?

A. No, sir.

Q. And so far as you know, knew nothing about it?

A. No, I don't believe he did.

RE-DIRECT EXAMINATION.

By Mr. Barnett:

Mr. Barnett: Can we have this as an exhibit in this case? It will be perfectly safe, or, if you object to it we will have the clerk make a copy of it. (Referring to Exhibit C).

Mr. Barnett: We will offer at this time defendant's Ex- 103
hibit C.

Mr. Owens: Objected to as having no bearing on any of the issues in this case.

The Court: Overruled.

It is stipulated by and between the parties hereto through their respective counsel that the premiums on the insurance applied for was ten per cent of the amount applied for, and it is further stipulated that the agent's commission for writing said business was fifteen per cent of the premium.

Mr. Barnett: Now, we will offer in evidence the deposition that we spoke of last night. I will offer the deposition of Mr. James J. Dunlap, Grand Forks.

Mr. Owens: To which the plaintiff objects on the ground and for the reason that it is incompetent, irrelevant and imma- 104
terial, not based on any definite facts or information which in any way relates to the issues of this action; it is not, however, objected to in so far as it relates to the mail-train service in and out of Tioga, North Dakota, or Williston, North Dakota.

The Court: I won't rule on that until I read the depositions over.

Deposition of James J. Dunlop, witness for the defendant, taken pursuant to the annexed notice to take deposition, before Frank Kilgore, a notary public at the office of Murphy & Toner, in the City of Grand Forks, North Dakota, on the 17th day of June, 1919, commencing at 10 o'clock A. M. Mr. W. H. Barnett and Mr. Nathan R. Chase appeared as attorneys for the defendant, and there was no appearance on behalf of the plaintiff.

JAMES J. DUNLOP,

a witness for the defendant, being first duly sworn, to testify to the truth, the whole truth and nothing but the truth, testified as follows:

Examinaion by Mr. Barnett:

Q. Your name?

A. James J. Dunlop.

Q. You reside in Grand Forks?

A. Yes.

Q. And have for many years?

A. Yes.

Q. What is your occupation at this time?

A. Assistant postmaster.

Q. And how long have you held that position?

A. Twenty-five years.

Q. Mr. Dunlop, you are more or less acquainted with the movement of mails in and out of Grand Forks?

A. Yes, sir.

106 Q. And have been conversant with those facts for many years last past?

A. Yes, sir.

Q. You are conversant with the movement of mails from the western part of the state, coming east?

A. Yes.

Q. And from the branches running north on the Great Northern Railway Company?

A. Yes, sir.

Q. Assuming, Mr. Dunlop, that a letter addressed to Grand Forks should be deposited in the post office one hour after the mail had left a given village or city, for Grand Forks, on any one of the branch lines leaving the north on the Great Northern, what would be the earliest possible time it could be received 107 at the Grand Forks office—in hours, if you can answer it that way?

A. From 26 to 30 hours, except some towns where the Soo trains happen to cross, it might be possible to connect the mail via Thief River Falls and Kenmare train to arrive here sooner.

Q. How many mail trains are there out of Williston during the day, coming east, if you know?

A. There are Nos. 28, 2 and 4, coming down there; they all carry mail, but some of them carry only pouch mail; others have service on them.

Q. Now, assuming that letter is deposited in the postoffice at Williston at any time after the departure of any one of the trains you have just mentioned, what would be the length of 108 hours elapsing before that mail would be received in Grand Forks? Eliminating for the purpose of this answer, train No. 28?

A. Mail deposited in the Williston post office in time to catch No. 4 should arrive in Grand Forks by 11 P. M. that night.

Q. What about No. 2?

A. As to train No. 2, undoubtedly they would have to carry their mail to Fargo, and be received at Grand Forks the following morning between 8 and 9 A. M.

Q. Can you give us the time elapsing between the departure of trains 2 and 4 from Williston?

A The time-table shows train No. 4 leaving Williston at 9:45 A. M., and train No. 2 at 11:10 A. M. at the present time.

Q. Now, assuming a letter was mailed in Williston after the departure of train No. 2, how long would it remain in that office before it would be mailed out, coming east to Grand Forks, not taking into consideration train No. 28?

A. Without looking up my schedule closer, I believe it would have to wait until the following morning to catch No. 4.

Q. Assuming that is correct, when would it be received in Grand Forks?

A. That would be on No. 30 at 10:30 the next evening.

Q. Now, assuming that No. 28 takes and receives mail at Williston for delivery in the East, does that mail come directly to Grand Forks, or does it go to Fargo for re-distribution?

A. If No. 28 receives mail at Williston for Grand Forks. and had no connections at Minot for this point, they would carry the mail to Fargo and dispatch it to train No. 29, arriving at Grand Forks the following morning.

Q. Eliminating train No. 28 from your answer and conclusion, assuming a letter was deposited in Williston directed to Grand Forks, after the departure of train No. 2 coming east, would it or would it not be possible that such letter could be delivered to the addressee in Grand Forks within twenty-four hours?

A. Off hand, I would say no.

Q. Are you familiar with the mail service between the southwestern part of the State of North Dakota and Grand Forks?

A. To some extent.

Q. Assuming that a letter should be mailed at Mott, North Dakota, at 9 o'clock A. M.. what would be the earliest possible moment that the letter could reach the addressee at Grand Forks, North Dakota?

A. Coming over the Milwaukee, it would take from thirty to forty hours.

Q. Now, assuming that it was carried over the Northern Pacific Railroad, and was mailed at 9 o'clock A. M. on Monday, what time could that letter be received in Grand Forks, North Dakota?

A. Mailed at Mott on Monday at 9 o'clock A. M.—according to the present schedule, it would not leave Mott until the following morning at 7 o'clock; arriving at Fargo that evening at about ten o'clock, and arrive at Grand Forks the following morning at 8:30 A. M., making approximately 48 hours.

Examination by Mr. Chase:

Q. Taking into consideration the branch lines running down from the towns of Crosby, Sherwood, Maxbass, Antler, Dunseith, Branden, Hansboro, Sarles, Hannah, Morden, Portage La Prairie and connecting with the main line of the Great Northern Railway Company running west from Grand Forks to Williston, have any of those lines more than one mail service a day coming east to Grand Forks?

A. They have but one mail train per day coming east.

112 Q. Consequently, if a letter addressed to a party or concern at Grand Forks, North Dakota, should be deposited in the post office of any town on any of the branches above named at a point of time subsequent to the departure of that daily mail train, could that letter get out of that town by due process of mail, before the departure of the mail train therefrom on the next succeeding day?

A. No, with the exception of such towns on any of the branches above named that are touched by the line of the Minneapolis, St. Paul and Sault Ste. Marie Railway Company running west from Thief River Falls to Kenmare.

Q. Basing your answer upon your experience, as well as upon conditions that have prevailed during the past three years, is it or is it not a fact that there are a number of towns
118 and villages located in that portion of North Dakota, represented by the counties of Divide, Williams, McKenzie, Golden Valley, Slope, Bowman, Adams, Hettinger, Stark and Billings, from which a letter mailed and addressed to a party or concern in the City of Grand Forks, North Dakota, could not reach Grand Forks within twenty-four hours, even if mailed from said town or village under the most favorable conditions?

A. It is a fact.

(Signed) JAMES J. DUNLOP.

(After reading the foregoing deposition the Court allowed the same in evidence).

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114 Mr. Barnett: We now offer the deposition of Mr. Larson, assistant postmaster at Bismarck.

Mr. Owens: To this deposition the plaintiff objects, generally, on the ground and for the reason that the facts testified to by the witness are remote and speculative and based upon a mere conclusion and not a statement of facts which in any way affect the issues of this lawsuit. There is no objection, however, to the foundation or to the regularity of the depositions.

Testimony of Harry Larson, of the County of Burleigh and State of North Dakota, taken before me, B. F. Tillotson Notary Public in and for Burleigh County, North Dakota, at Bismarck, North Dakota, on the 19th day of June, A. D. 1919, by virtue of the notice hereunto attached:

HARRY J. LARSON,

called as a witness in behalf of the defendant, being first duly 115
sworn, testified as folows:

DIRECT EXAMINATION.

By Mr. Barnett:

Q. What is your name?

A. Harry Larson.

Q. Where do you reside?

A. Bismarck, North Dakota.

Q. How long have you resided here?

A. Thirty-seven years.

Q. What is your occupation at this time?

A. Superintendent of mails.

Q. You are connected with the Federal mail service at Bismarck? 116

A. Yes, sir.

Q. How long have you been engaged in that line of business?

A. Nineteen years, eleven months.

Q. Are you familiar with the time of the incoming and outgoing mail at Bismarck in a general way?

A. Yes, sir.

Q. Mr. Larson, assuming that mail was deposited in the post office in a city or town on one of the branches leading north or south from the main line of the Northern Pacific, in the State of North Dakota, addressed to a person in the City of Bismarck, immediately after the mail train had departed from any one of these towns located on the different branches above mentioned, what would be the number of hours that would 117
probably elapse before it could reach the addressee?

(It is noted in the certificate that Hon. E. T. Burke appeared for the plaintiff and W. H. Barnett represented the defendant).

Mr. Burke: That question is objected to on the ground that it is incompetent, irrelevant and immaterial, calling for a conclusion of the witness; and all of the testimony hereinafter adduced along those lines is objected to for the same reason, in order to save frequent objections

A. Well, it would be twenty-four hours until the next train would bring that mail in.

Q. And to that twenty-four hours it would be necessary to add the length of time elapsing between the given station and the City of Bismarck?

A. I figure it would be 24 hours from the time that train, that it should have come in on, until the next train.

Mr. Burke: I suppose I can have this same line of objection all through?

Mr. Barnett: Yes.

118 (Question read to the witness).

Mr. Barnett: That is, the transportation of the letter?

A. Yes.

Q. From your experience and knowledge of the transportation of mail from the different stations in the State, can you state from such knowledge as to whether or not there are stations from which mail could not be received in Bismarck under the most favorable circumstances within twenty-four hours?

A. Yes, sir.

Q. Approximately give us the number, if you can?

A. Well, I should judge there was probably 25 or 30.

Q. Are there stations from which there is only a weekly mail?

A. Yes, sir.

119 Q. And can you give us approximately the number of those in this State?

A. Yes. I could not say the number but there might be two or three; I could name one; that is Hanley, North Dakota; they have once a week service.

Q. Are you acquainted with the number of mail trains per day on these different branches, or at least some of the branches within the State?

A. Yes.

Q. What is the number of mails per day coming south or north into Bismarck over those branches?

A. Well, we get mail once a day from the Mott line, the Mandan-Mott; we get mail once a day from the Mandan-Killdeer; once a day from the Drake and Bismarck; once a day

120 from the Hankinson and Bismarck; there is also some towns on the main line that we only get mail from once a day, such as Menoken, Sterling, and there are some west, of course; Almont is only supplied once daily.

Q. Now, calling your attention to the lines leading north from the main line of the Great Northern Railway, are you familiar with the mail conditions and the time of arrival of mails from those different points?

A. Well, very nearly. Of course, I couldn't say exactly, on the exact time they get in there.

Q. Let's take the town of Hannah as an illustration, one of the north branches of the Great Northern; assuming that a letter was deposited in the post office at Hannah directed to some person or firm in the City of Bismarck, and deposited in the post office of Hannah, immediately after the departure of the train going south, what would be the earliest possible mo-

ment that that mail could be delivered or distributed into the box of the addressee at Bismarck? 121

A. That would be twenty-four hours.

Q. For instance, there is only one mail a day?

A. Yes, the train leaves at 11:45 in the morning. It would get in here at 12:30 at night if it went right through.

Q. On No. 1?

A. On One. If it was mailed an hour after that train left it would not get in here until Three—next noon.

Q. How would it get out of Hannah?

A. It would be thirty-six hours.

Q. It has to go to Grand Forks and then go to Fargo and then stay in Fargo until the next morning; that would mean between 35 and 36 hours?

A. Yes. 122

Mr. Burke: I move to strike out the testimony of the witness on the grounds made when each question was severally objected to.

The Court: Overruled.

(Signed) HARRY LARSON.

(The Court overrules the objection made by Mr. Owens to the introduction of the deposition and admits the same in evidence).

Mr. Barnett: We offer in evidence the depositions of Edward N. Campbell and Claude E. Nugent.

Mr. Owens: The same objection last heretofore stated.

Testimony of Edward N. Campbell of Fargo, Cass County North Dakota, taken before Peter Melby, a Notary Public in and for Cass County, North Dakota, at Fargo, N. Dak., on the 18th day of June, 1919, by virtue of the notice hereunto attached. Arthur W. Fowler appearing for plaintiffs, but offering no examination of the witnesses, and the defendant being represented by W. H. Barnett and Nathan H. Chase. 12

EDWARD M. CAMPBELL.

being first duly sworn, to testify to the truth, the whole truth, and nothing but the truth, testified as follows;

Examination by W. H. Barnett:

Q. Your name is?

A. Edward M. Campbell.

Q. Where do you reside?

A. At 1433 First Avenue No., Fargo.

Q. What is your occupation?

A. Post office clerk.

Q. For how long have you been connected with the post
124 office at Fargo?

A. A little over nine years.

Q. Prior to that time had you had any experience in the State of North Dakota in connection with the mail service?

A. Not with the mail service.

Q. From your employment, Mr. Campbell, have you become familiar with the mail service, the time of the arrival and departure of mail from the City of Fargo?

A. Yes, sir.

Q. What is the fact as to your being familiar with the arrival of mails from different points in the western part of the State at the office in Fargo?

A. Fairly good on that point.

Q. From your observation and experience and knowledge
125 of arrival of trains carrying mail for delivery to addressees in Fargo, what is the fact as to the number of hours required to deliver mail in the City of Fargo, assuming that it was deposited in the post office at Hannah, N. Dak., after the mail train for that day had left Hannah?

A. Well, it would be the next day before it would come down. It would come in the next night on No. 30 at 12:30, and the mail would probably be worked up within two hours.

Q. So that, as I understand it, it would remain in the post office at Hannah until the next day, about 23 hours after?

A. It would leave Hannah at 11:45 the next morning, arrive in Grand Forks at 4:45, and would reach Fargo on train No. 10, if on time, arriving at 8:40, and would be distributed into the boxes within two hours.

126 Q. Will you kindly give us the number of hours from the time of the deposit in the post office at Hannah until it could be distributed in the boxes at Fargo for delivery to the addressee?

A. If mailed at 12 o'clock it would be 23 hours and 45 minutes before it would leave Hannah, and it would be 11 o'clock the next evening before it would be in the boxes here. That would be about 33 hours.

Q. Now, would that, based upon the same hypothesis, be true as to all lines running north from the Great Northern?

A. Yes, sir, that would be true.

Q. Can you designate, or do you know of towns in the State where mail deposited just prior to the leaving of the mail train for the day, could under the most favorable circumstances, not reach Fargo and be distributed in the boxes within 24 hours?

A. There are towns that couldn't be distributed within 24 hours.

Q. Now, I call your attention to the southwestern portion of the State, say, for instance Mott, assuming that a letter was deposited in the post office at Mott at eight o'clock in the morning, how long would it require, in hours, before it could be delivered in the box of addressees at Fargo? 127

A. The train leaves Mott at 7:10 and arrives in Mandan at 12:50 at noon. That would be in time to connect with train No. 8, and would get into Fargo at ten o'clock the same evening and would be distributed in the boxes by 12 o'clock.

Q. So that the addressee could receive it from the box the next morning?

A. Yes, sir.

Q. This answer of yours is predicated on the fact that the letter was taken out of the post office at Mott the same morning that it was delivered there? 128

A. Yes, sir.

Q. Assuming that a letter was mailed at Mott at eight o'clock Monday morning, when would such letter reach Fargo?

A. It would get in here at 12:40 on Tuesday noon.

Q. Do you know of places in this State where it would be impossible to deliver mail within 24 hours?

A. Yes, sir, there are such places.

Q. Are you acquainted with the approximate distance from Fargo of the town of LaMoure, N. Dak.?

A. Yes, sir.

Q. How many miles from Fargo?

A. About 80 miles.

Q. How many mail trains a day, using 24 hours to make a day, are there running from LaMoure to Fargo? 129

A. The train comes down in the evening at 7:10, on the Southwestern, that would be the first train that mail could come from LaMoure to Fargo on.

Q. What time does that train leave LaMoure?

A. At 3:42 P. M.

Q. What time does the next mail train leave LaMoure carrying mail to Fargo?

A. The next train leaves at 4:17, and goes by the way of Jamestown.

Q. Now, assuming that a letter was mailed in the post office at LaMoure at 5 P. M. any given day addressed to a party or concern in Fargo, N. Dak., when would it get to Fargo?

A. The next evening.

Q. What would be the least number of hours required for that letter to reach Fargo and be deposited in the box of the addressee in the post office at Fargo?

A. About 29½ hours.

130 Q. Would it be possible to mail a letter in the post office at the town of Lisbon, N. Dak., addressed to a party or concern at Fargo, N. Dak., at an hour between eight o'clock in the morning and six o'clock in the evening at which that letter could not reach Fargo in 24 hours?

A. Yes after the train leaves there.

Q. As I understand your answer if the letter was mailed at Lisbon shortly after the train left there that day for Fargo. the letter could not get out of Lisbon until the corresponding train the next day?

A. There is a supply from Lisbon to the Soo.

Q. Assuming that you used the supply from Lisbon to the Soo, could the letter reach Fargo for deliverey to the addressee within 24 hours provided it was not put in the post office at Lisbon until after the departure of the Northern Pacific mail
131 train?

A. No, sir.

Q. Assuming that a letter was deposited in the post office at the town of Stanton, N. Dak., addressed to a party or concern at Fargo, said deposit in the post office at Stanton being made within two hours after the departure from Stanton of the mail train going south on that day, could that letter then reach Fargo, N. Dak., for distribution to the addressee within 24 hours?

A. No, sir.

Q. Is it, or is it not a fact that the same mail service as you have described, prevails on the Southwestern road as far as Edgerly?

132 A. Yes, sir.

Q. And mail deposited at any one of the villages between Fargo and Edgerly, N. Dak., a few moments after the departure of the mail train east, for that day, could not possibly be delivered to the addressee at Fargo within twenty-four hours?

A. No, sir.

(Signed) EDWARD M. CAMPBELL.

(The Court overruled the objection to the introduction of this deposition in evidence).

Testimony of Claude E. Nugent of Fargo, Cass County, N. Dak., taken before Peter Melby, a Notary Public in and for Cass County, North Dakota, at Fargo, N. Dak., on the 18th day of June, 1919, by virtue of the notice hereunto attached.

CLAUDE E. NUGENT

being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, testified as follows:

Examination by Mr. N. H. Chase: 133

Q. Your name is—?

A. Claude E. Nugent.

Q. Where do you reside?

A. Fargo, N. Dak.

Q. How many years, approximately, have you resided here?

A. 38 years.

Q. What is your present occupation, Mr. Nugent?

A. Secretary and treasurer of MaGill & Company, dealers in field seeds and seed grains. Also superintendent of the Western Adjustment & Inspection Company for the division of North Dakota.

Q. And as such superintendent of the Western Adjustment & Inspection Company for the district of North Dakota, what are your duties, generally speaking? 134

A. I had general supervision of the adjustment of all hail losses for the stock insurance companies who are members of what is known as the Bureau.

A. That is, I suppose, adjustment of hail losses occurring in the State of North Dakota?

A. Yes, sir.

Q. How long have you had supervision of such hail losses, how many years as superintendent of the Western Adjustment Company?

A. Three years.

Q. Did that include 1916, 1917 and 1918?

A. Yes, sir.

Q. Will you name some of the companies writing hail insurance who are members of the Western Hail Association, and in 135 connection with the hail losses of which in the State of North Dakota you have had general supervision?

A. Hartford Fire Insurance Company; Home Insurance Company; Franklin Insurance Company; Great American Insurance Company; American Alliance Insurance Company; Twin City Fire Insurance Company; Middlewest Underwriters; Minneapolis Fire and Marine; Northwestern Fire and Marine; Bankers & Merchants Fire Insurance Company; Rochester Department of the Great American; London, Liverpool & Globe.

Q. I will ask you whether or not you know whether, during the seasons of 1916, 1917 and 1918, the companies that you have named had a limit as to the amount of hail insurance any one of those companies would write on any one section of land lying in North Dakota?

A. To the best of my knowledge, all application blanks limit the total liability on a given section.

Q. To a certain number of dollars?

136 A. To a certain number of dollars on a given section.

Q. I will ask you whether or not you know of your own knowledge whether it frequently happens within the State of North Dakota that a man owning land on a given section will apply to an insurance agency in a certain town for hail insurance on that land, while another man living also on the same section will apply for hail insurance on his land to an agent living in some other town, both agents representing the same company?

A. That is a very common occurrence.

Q. Are you familiar, in a general way, with the method and practice obtaining in the home office of these insurance companies with reference to the matter of recording hail insurance on specified pieces of land in the various States in which they

137 issue policies of hail insurance? To be a little more specific, I mean with reference to plat books or map books?

A. In all instances which have come under my observation, it is the practice of the recording offices to maintain what is known as a plat book, and on receipt of each and every application, the amount of insurance applied for is noted on the section referred to in the application.

(Signed) CLAUDE E. NUGENT.

(Received in evidence).

Under the stipulation, it is stipulated between counsel that the registered letter containing the application and remittance for the premium was received at Waseca, Minnesota, the West

138 ern office of the defendant, on the 16th day of July, 1917.

Mr. Barnett: Defendant rests.

Mr. Owens: If the depositions of the defendant is considered in full the plaintiff asks the Court to take judicial notice under the statutes of the State of North Dakota of the ordinary time of railroad trains and that there are facilities for business by railroad and telegraph between Tioga, North Dakota, and Waseca, Minnesota, and was at the time of the alleged transaction; also further asks the Court to take judicial notice under the Statutes of North Dakota that matters carried throuh the mail will reach their destination in the regular and most expedient course of the mail, also that commercial usages of the State is to observe Sunday.

Mr. Owens: Plaintiff rests.

Mr. Barnett: At this time defendant moves the Court for judgment in favor of the defendant and against the plaintiff herein, upon the ground and for the reason, first: That the provisions of Section 4902, Compiled Laws of North Dakota, 1913, do not apply, to an application for insurance of the form and character herein in issue and under consideration. Second: That in so far as the provisions of said Section 4902 in any way tend to operate and control, qualify, avoid or nullify the express provision in said application that it should "take effect from the date it was received and accepted as evidenced by the issuance of a policy thereon at the Waseca, Minnesota Agency" for said defendant, said Section 4902 is repugnant to and in violation of the Thirteenth Section of Article One of the Constitution of the State of North Dakota and the Fourteenth Amendment of the Constitution of the United States, in that it expressly operates in depriving this defendant of liberty or freedom to contract, of property without due process of law, and of the equal protection of the laws, and, in addition is unreasonable in its requirements, and, is therefore, and consequently, null and void. Third: That by the act of making and signing said application plaintiff expressly and wholy waived all and several the provisions and conditions set forth in said Section 4902. Fourth: That the testimony offered and received in behalf of plaintiff together with the stipulated facts herein wholly fails in showing or establishing any contract of insurance between plaintiff and defendant herein. Fifth: That under all the testimony offered and adduced in this case and the stipulation of facts heretofore filed herein and made a part hereof plaintiff is not entitled to recover, and judgment should be entered for defendant. 139 140 141

I, E. E. Hanyen, hereby certify that the within and foregoing is a true, correct and complete record of all testimony, proceedings, depositions, objections and rulings of the Court had at the trial of the above entitled action before the Court, and that said transcript is a true and correct record of everything which it purports to contain.

E. E. HANYEN,
Official Stenographer.

142 STATE OF NORTH DAKOTA, IN DISTRICT COURT,

ss.

County of Willliams. Eleventh Judicial District.

ROBERT WANBERG,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, of Pittsburg, Pa., a foreign insurance corporation,

Defendant.

FINDINGS, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.

The above entitled action being on the regular calendar of
143 cases to be tried at the June, 1919, term of the District Court in and for Williams County, North Dakota, and it having been stipulated between the plaintiff and the defendant company by and through their respective attorneys, that a jury for the trial of the said cause be and was waived and that issues joined therein be tried before the Court without a jury, and the same having been called for trial on the 18th day of July, 1919, and a trial thereof having been had, the plaintiff appearing in person and by his attorney, Wm. G. Owens, and the defendant by its attorneys, Barnett & Richardson and Nathan Chase, the plaintiff and defendant submitting to the Court a stipulation agreeing to a part of the facts thereto, and the plaintiff and defendant having adduced evidence before the Court in accordance and support of the answer of the defendant therein, and after the submission of the evidence counsel for both plaintiff
144 and defendant having submitted to the Court written arguments and briefs and the whole cause having been submitted to the Court and the Court being fully advised therein as to the law and facts contended for and relating to the issues therein joined and based thereon, the Court makes the following:

FINDINGS OF FACT.

I.

That at all times mentioned in the pleadings in said action and on and prior to the 12th day of July, 1917, the defendant was and still is a foreign corporation, organized and existing with its principal place of business at Pittsburgh, Pennsylvania, but during all of such times it was duly authorized and did transact its business within the State of North Dakota and in accordance with the laws of the State of North Dakota, and was engaged in the State of North Dakota in the business of insuring growing crops of grain against loss or damage from

hail and other causes and was authorized so to do under the insurance laws of the State of North Dakota and in conformity therewith.

II.

That on the 12th day of July, 1917, and prior thereto the plaintiff was the owner and held an insurable interest in all crops of grain grown and sown on lands located in Williams County, State of North Dakota, and described as follows, to-wit:

The Northeast Quarter (NE¼) of Section Twenty-five (25) in Township One Hundred Fifty-six (156) North of Range Ninety-six (96) and the North Half of the Northeast Quarter (N½NE¼) Southwest Quarter of the Northeast Quarter (SW¼NE¼) and the Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section Thirty-one (31) Township One Hundred Fifty-six (156) North of Range Ninety-five (95).

III.

That on the 12th day of July, 1917, at ten o'clock in the forenoon the plaintiff made, executed and delivered to one Gus W. Everson a certain application in writing for insurance on his crops then growing on the lands hereinbefore refered to against loss or damage by hail and other causes, and at the time of delivering said application paid to the said Gus W. Everson $140.00 as a premium and in payment of such insurance, which application was for insurance in the sum of $1,400.00, which was to cover any loss or damage by reason of hail to said crops, particularly during the term and period between the 12th day of July, 1917, and the 15th day of September, 1917, at noon, and in case of such loss on proof that the same was payable to the plaintiff on or before November 1st, 1917.

IV.

That at said time and place and at the time of soliciting and accepting such application of insurance from the plaintiff, the said Gus W. Everson was the duly authorized local agent of the defendant company at Tioga, North Dakota, and vicinity thereof, and was duly authorized to solicit and accept from the plaintiff the application for hail insurance and the payment of premium therefor, and did on the 12th day of July, 1917, at ten o'clock in the forenoon, accept from the plaintiff the application for hail insurance together with payment of premium thereof.

V.

That during all times prior to and after making application for insurance and paying the premium therefor as hereinbefore set forth, the plaintiff complied with all the terms and condi-

tions required of him to be done by his application for hail in-
148 surance.

VI

That on the 14th day of July, 1917, and at about six o'clock in the evening, the growing crops of plaintiff hereinbefore referred to covered by the insurance application for plaintiff were totally destroyed and damaged by hail, and that thereafter and within the time prescribed in plaintiff's application, the plaintiff notified defendant company and performed all other things required of him to be done and performed as required by the defendant company.

VII.

And that plaintiff's loss and damage by reason of such hail to the said crops was in the sum of $1,400.00 and that plaintiff thereafter harvested and secured from the same, the crops of
149 the value of $145.74, computed according to the conditions and prices set forth in the application for insurance hereinbefore referred to, all of which the defendant received due notice of and in accordance with its application covering the insurance of the crops on said land and that such damage and loss was not occasioned by any other reason than that of hail, and defendant is liable to plaintiff for such loss and damage and according to such application in the sum of $1,400, less crops secured of the value of $145.74.

VIII.

That the said application of the plaintiff for insurance was not received by the defendant at its Waseca, Minnesota, office prior to the time of such loss by hail, but the said defendant company at no time notified the plaintiff applicant, nor its
150 authorized local agent, Gus W. Everson at Tioga, by telegraph that it declined to write the insurance as applied for, but did at a time after such loss return to its said local agent plaintiff's application, and such agent thereafter offered to return the said application and premium to the plaintiff, which plaintiff then refused to accept.

IX.

That the plaintiff has duly demanded of the defendant payment for such loss, but that the defendant company has at all times refused to recognize any right of the plaintiff by reason of such application for insurance and the payment of premium therefor and at no time ever executed their policy of insurance to the plaintiff nor recognized any liability by reason of such application for insurance.

X.

That the said application for insurance and premium paid therefor by the plaintiff was at all times made in accordance

with the insurance laws of the State of North Dakota and at the time of making such application and the payment of premium therefor by the plaintiff to the defendant there was and is in full force and effect, a statute in the State of North Dakota relating to the business of insurance in the State of North Dakota relating to the business of insurance against hail known as Section 4902 of the Compiled Laws of the State of North Dakota for 1913, as follows: 151

"Every Insurance Company engaged in the business of insuring against loss by hail in this State, shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and the hour the application for insurance has been taken by the authorized local agent of said company, and if the company shall decline to write the insurance upon receipt of application, it shall forthwith notify the applicant and agent who took the application, by telegram, and in that event, the insurance shall not become effective. Provided, that nothing in this article shall prevent the company from issuing a policy on such application and putting the insurance in force prior to the expiration of said twenty-four hours." 152

XI.

The Court finds as untrue, the allegation and claim of the defendant company, that there was collusion and fraud between the plaintiff, and Gus W. Everson as representative and local agent of the defendant company, but that in all things the business referred to in the solicitation and acceptance of the application for insurance and reporting thereof to the company defendant was regular and in all things according to law and in accordance with the terms and conditions of the laws of the State of North Dakota, the Court finds as. 153

CONCLUSIONS OF LAW.

1. That the plaintiff is entitled to judgment against the defendant for the sum of $1,254.25 damages with interest thereon at the rate of six per cent per annum from the 1st day of November, 1917, together with his costs and disbursements of this action to be taxed by the Court.

2. That the claim of defendant company that Section 4902 of the Compiled Laws of North Dakota for the year 1913 hereinbefore referred to and quoted is unconstitutional and invalid, is untrue and that the said section is in accordance with and a part of the insurance laws of the State of North Dakota, under which the defendant company was doing business at the time of receiving the application from the plaintiff.

ORDER FOR JUDGMENT.

154 It is hereby ordered, that plaintiff have judgment in accordance with the above findings and that the same shall be made and entered by the Clerk of the District Court in and for Williams County, North Dakota.

(Dated and signed)

FRANK E. FISK, Judge.

STATE OF NORTH DAKOTA, IN DISTRICT COURT,

ss.

County of Wiliams. Eleventh Judicial District.

ROBERT WANBERG,

Plaintiff,

vs.

155 NATIONAL UNION FIRE INSURANCT COMPANY, of Pittsburg, Pa., a foreign insurance corporation,

Defendant.

JUDGMENT.

The above entitled action came on for trial at the regular June, 1919, term of the District Court in and for Williams County, North Dakota, plaintiff appearing in person and by his attorney, Wm. G. Owens, and the defendants appearing by their attorneys, Barnett & Richardson and Nathan Chase, and a jury having been waived by stipulation and the said case having been tried before the Court without a jury and the matter having been submitted to the Court for judgment and the Court having made its findings of fact, conclusions of law and
156 order for judgment in favor of the plaintiff and against the defendant, and filed the same; now therefor, on motion of Wm. G. Owens, attorney for the plaintiff,

It is hereby ordered and decreed that the plaintiff Robert Wanberg have and recover of the defendant, National Union Fire Insurance Company of Pittsburg, Pa., a foreign insurance corporation, the sum of Fourteen Hundred Five and 85/100 dollars as interest and principal together with costs and disbursements taxed and allowed at the sum of One Hundred Ten and 85/100 dollars, making a total judgment in favor of said plaintiff and against the said defendant in the sum of Fifteen Hundred Sixteen and 65/100 dollars.

Dated November 26, 1919.

FRANK E. FISK,

(Seal) Judge.

STATE OF NORTH DAKOTA, IN DISTRICT COURT, 157
ss.
County of Williams. Eleventh Judicial District.

ROBERT WANBERG,
Plaintiff,
vs.
NATIONAL UNION FIRE INSURANCE COMPANY, of Pittsburg, Pa., a corporation, Defendant.

MOTION FOR JUDGMENT OR FOR A NEW TRIAL.

Now comes the above named defendant and moves the Court for judgment in favor of the defendant, dismissing plaintiff's action, or in the alternative, for a new trial thereof, upon the following grounds and reasons: 158

1. Insufficiency of the evidence to justify the order for judgment and judgment in the above entitled action.
2. That the findings, conclusions, order for judgment and judgment, are against law.
3. Errors of law occurring at the trial, and excepted to by the defendant.

Which said grounds and reasons are contained in and made a part of the specifications of insufficiency and specifications of error hereto attached and made a part hereof.

That said motion for new trial will be made upon a statement of the case, together with all the files and records in the above entitled action.

Dated January 17th, 1920.

BARNETT & RICHARDSON, 159
Attorneys for Defendant,
Fargo, N. Dak.

STATE OF NORTH DAKOTA, IN DISTRICT COURT,
ss.
County of Williams. Eleventh Judicial District.

ROBERT WANBERG,
Plaintiff,
vs.
NATIONAL UNION FIRE INSURANCE COMPANY, of Pittsburg, Pa., a corporation, Defendant.

ORDER DENYING MOTION.

This matter coming on to be heard before the above entitled Court on the motion of the above named defendant, for judgment, or in the alternative for a new trial, said motion being

made upon a statement of the case, together with specifications
160 attached to defendant's motion for new trial, together with all the files and records in the above entitled action, and the Court having duly considered the matter, and being fully advised in the premises, and the parties having stipulated that the same may be heard by the Court without argument, in connection with said stipulation,

It is ordered, that said motion be and the same is hereby denied.

Dated February 5th, 1920.

FRANK E. FISK, Judge.

STATE OF NORTH DAKOTA, IN DISTRICT COURT,

ss.

County of Williams. Eleventh Judicial District.

161

ROBERT WANBERG,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, of Pittsburg, Pa., a foreign insurance corporation,

Defendant.

NOTICE OF APPEAL.

To the above named plaintiff, and to William G. Owens, his attorney:

Take notice, that the above named defendant hereby appeals to the Supreme Court of the State of North Dakota, from that certain judgment entered in the above entitled action on the
162 26th day of November, 1919, in favor of the above named plaintiff and against the above named defendant, in the amount of $1,516.65, and from the order of the above entitled Court denying defendant's motion for judgment or a new trial, under date of February 5th, 1920, and from the whole of said judgment and the whole of said order, as aforesaid.

Dated February 17th, 1920.

BARNETT & RICHARDSON,
Attorneys for Defendant,
Fargo, N. Dak.

STATE OF NORTH DAKOTA, IN DISTRICT COURT,
County of Williams, Eleventh Judicial District. 163

ROBERT WANBERG,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY of Pittsburg, Pa., a foreign insurance corporation, Defendant.

UNDERTAKING ON APPEAL.

WHEREAS, on the 26th day of November 1919, in the District Court within and for the County of Williams the above named Respondent recovered a judgment against the above named Appellant for Fifteen Hundred and Sixteen and 65/100 damages and costs;

And the above named appellant, feeling aggrieved hereby, 164
intends to appeal therefrom to the Supreme Court of the State of North Dakota;

NOW, THEREFORE, We do hereby undertake that the said Appellant will pay all costs and damages which may be awarded against it on said appeal, or on a dismissal thereof, not exceeding Two Hundred and Fifty Dollars; and do also undertake in the sum of Two Hundred Fifty Dollars that if the said judgment so appealed from, or any part thereof, is affirmed, or said appeal is dismissed, the said Appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it is affirmed only in part, and all damages which shall be awarded against said Appellant on said appeal, not exceeding the aggregate of the amounts above mentioned. 165

Dated February 17th, 1920.

NATIONAL UNION FIRE INS. CO.,
By SETH W. RICHARDSON,
One of Their Attorneys.
AMERICAN SURETY CO. OF NEW YORK,
By THOS. B. HULL,
Attorney in Fact.

STATE OF NORTH DAKOTA, } ss.
County of Cass. }

On this 24 day of March in the year one thousand nine hundred and twenty, before me, Peter Melby, a Notary Public in and for said County and State, personally appeared Seth W. Richardson, Atty for the above defendant and Thomas B. Hull, Atty. in fact for the American Surety Co. of N. Y., known to me to be the persons who are described in and who

executed the foregoing instrument, and acknowledged to me
166 that they executed the same, on behalf of their respective principals.

(Seal) PETER MELBY,
Notary Public, Cass Co., N. Dak.

My commission expires May 5, 1921.

STATE OF NORTH DAKOTA, IN DISTRICT COURT,
County of Williams, Eleventh Judicial District.

ROBERT WANBERG,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY of Pittsburg, Pa., a corporation, Defendant.

167

SPECIFICATION OF ERRORS.

1. The Court erred in not including in its first Finding of Fact that the defendant had been continuously engaged in business in the State of North Dakota for several years prior to the 12th day of July, 1917.

2. The Court erred in finding in its third Finding of Fact that the application for insurance therein referred to was to cover any loss or damage by reason of hail to said crop particularly during the term and period between the 12th day of July, 1917 and the 15th day of September, 1917.

3. The Court erred in making its fifth Finding of Fact that the plaintiff complied with all the terms and conditions required of him to be done by an application for hail insurance.

168 4. The Court erred in making its sixth Finding of Fact that within the time prescribed in plaintiff's application, the plaintiff notified the defendant company and performed all of the things required of him to be done and performed as required by the defendant company.

5. The Court erred in making its seventh Finding of Fact that the defendant was liable to the plaintiff for the loss and damage therein referred to, in the amounts therein referred to.

6. The Court erred in failing to find in its eighth Finding of Fact, that the defendant returned the premium paid by the plaintiff, to defendant's local agent, in connection with plaintiff's application therein referred to.

7. The Court erred in making its tenth Finding of Fact that plaintiff's application and premium was made in accordance with the laws of the State of North Dakota, and that the statute therein referred to was in full force and effect at the time of the making of such application and payment of such premium.

8. The Court erred in making its eleventh Finding of Fact that there was no collusion and fraud between plaintff and defendant's local agent, and in finding that the matters in connection with the solicitation and acceptance of the application and report thereof, was legal and in all things according to law, and in accordance with the terms and conditions of law. 169

9. The Court erred in making its first Conclusion of Law that plaintiff was entitled to judgment against the defendant for the sum of $1254.25, with interest and costs as therein set forth.

10. The Court erred in making its second Conclusion of Law, holding that Section 4902 is constitutional and valid, and that said section is in accordance with and a part of the law of the State of North Dakota under which defendant was doing business at the time of receiving the application in question. 170

11. The Court erred in making its Order for Judgment in favor of the plaintiff in accordance with its Findings and Conclusions.

12. The Court erred in overruling defendant's motion for a dismissal of plaintiff's action, found on page 24 of the Statement of the Case.

13. The Court erred in denying defendant's motion for judgment in favor of the defendant, dismissing plaintiff's action, found on pages 55, 56 and 57, Statement of the Case.

14. The Court erred in not finding and holding that the provisions of Section 4902 do not apply to an application for insurance of the form and character of Exhibit 1.

15. The Court erred in not finding and holding that the act of making, signing and delivering the application, Exhibit 1, operated as a waiver of Section 4902. 171

BARNETT & RICHARDSON,
Attorneys for Defendant,
12-13-14 First Nat'l. Bank Bldg.,
Fargo, North Dakota.

172 STATE OF NORTH DAKOTA, IN DISTRICT COURT,
County of Williams, Eleventh Judicial District.

ROBERT WANBERG,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY of Pittsburg, Pa., a corporation, Defendant.

SPECIFICATIONS OF INSUFFICIENCY.

1. The evidence is insufficient to show that the provisions of Section 4902 apply to or have reference to the application for insurance, Exhibit 1.

2. The evidence is insufficient to show that it was possible for the defendant to comply with the provisions of Section
173 4902, in that the evidence conclusively shows that it was impossible for the defendant to receive said application for insurance and pass upon the same within the time set forth in Section 4902.

3. The evidence is insufficient to establish the fact that the plaintiff did not knowingly and intentionally wave the provisions of Section 4902, and agree expressly that the said application was to take effect from the day the same was accepted, as evidenced by the issuance of a policy thereon, at the Waseca agency for said company.

4. The evidence is insufficient to sustain a judgment in favor of the plaintiff for any amount whatsoever.

Dated January 17th, 1920.

BARNETT & RICHARDSON,
174 Attorneys for Defendant,
12-13-14 First Nat'l. Bank Bldg.,
Fargo, North Dakota.

STATE OF NORTH DAKOTA, IN DISTRICT COURT,
County of Williams, Eleventh Judicial District. 175

ROBERT WANBERG,
Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY of Pittsburg, Pa., a corporation. Defendant.

SPECIFICATION OF FACTS ULTIMATELY ESTABLISHED.

1. That on July 12th, 1917, at 10 A. M. of said day, plaintiff made, executed and delivered to defendant's agent, Everson, the application, Exhibit 1.

That on July 13th, 1917, the same was mailed by defendant's agent, to the defendant at Waseca, Minnesota. 176

That the same arrived at Waseca, Minnesota, on Sunday, July 15th, 1917, and that the same was delivered to defendant on Monday, July 16th, 1917.

That on July 17th, 1917, the said application and premium was rejected by the defendant, and mailed back to plaintiff's agent, and that thereafter the said application and premium was tendered back to the plaintiff by defendant's agent.

That the defendant company, at the time of the rejection of the application and premium, was not advised or aware of the happening of the hail storm which destroyed plaintiff's crop, and that said hail storm occurred about six o'clock P. M. on July 14th, 1917.

2. That it was impossible for the defendant to receive the application, Exhibit 1 and pass upon the same in accordance 177 with the provisions of Section 4902, and that the plaintiff in making and signing the said application, Exhibit 1, waived the provisions of Section 4902, in so far as this defendant is concerned.

3. That the provisions of Section 4902, under the facts in this case, are in violation of Section 13 of Article One of the Constitution of the State of North Dakota, and the Fourteenth Amendment to the Constitution of the United States.

BARNETT & RICHARDSON,
Attorneys for Defendant,
12-13-14 First Nat'l. Bank Bldg.,
Fargo, North Dakota.

178 IN SUPREME COURT
STATE OF NORTH DAKOTA

ROBERT WANBERG,
Plaintiff and Respondent,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, a foreign insurance corporation, Defendant and Appellant.

(1) Section 4902, C. L. 1913, which provides that every insurance company engaged in the business of insuring against loss by hail shall be bound and the insurance take effect from and after twenty-four hours from the day and hour of application unless it shall notify the applicant by telegram of the rejection of his application, applies to an insurance company
179 taking an application for hail insurance along with additional risks.

(2) Section 4902, C. L. 1913, the substance of which is above stated, imposes a duty upon insurance companies doing hail insurance business of acting promptly upon such applications. It is within the police power of the state and does not deprive insurance companies of liberty of contract or property without due process of law.

(3) Where a statute in substance provides the form of an application for hail insurance with respect to the time when insurance shall be made effective, the benefit of the statute is not waived by an unauthorized, conflicting provision contained in the application.

(Syllabus by the Court.)

180 Appeal from the district court of Williams County, Fisk, J.

AFFIRMED.

Opinion of the Court by Birdzell, J.

Barnett & Richardson, Fargo, attorneys for Appellant.

Wm. G. Owen, Williston, attorney for Respondent.

Wanberg v. National Union Fire Ins. Co.

Birdzell, J.: This is an action in which the plaintiff seeks to recover insurance covering a hail loss. On July 12th, 1917, at ten o'clock in the morning the plaintiff gave to one Everson, a local agent for the defendant, an application for insurance on his crops in the sum of $1400, paying a premium therefor of $140. The application, so far as material to this case, reads as follows:

"I, Robert Wanberg of Tioga, P. O. County of Williams State of No. Dak., hereby make application for insurance to take effect from the day this application is received and accepted as evidenced by the issuance of a policy thereon, at the Wa-

seca, Minnesota, Agency for said Company, and to and on the 15th day of September, 1917, upon growing crops against loss, damage or failure from hail or any other cause except fire, floods, winter kill or failure on my part to properly prepare the ground for seeding and properly seed, care for, harvest, protect and thresh said crop during the crop season of 1917 to the amount of Fourteen Hundred Dollars, * * *"

On July 13th, 1917, Everson mailed the application and the premium remittance to the defendant at Waseca, Minnesota. It was received in the Waseca postoffice on Sunday, July 15th, and delivered Monday, July 16th. On the preceding Saturday, July 14th, shortly after six o'clock in the evening the damage from hail for which recovery is sought occurred. On July 17th the defendant's agent at Waseca mailed the application and premium remittance to Everson, stating that applications for crop insurance would not be accepted at that late date. There is no evidence that the Waseca agency at that time knew that the plaintiff had already incurred loss. When the application and premium were tendered back to the plaintiff, the tender was refused and this action brought. The case was tried to the court without a jury and resulted in a judgment for $1405.85 and costs. Motion for a judgment non obstante or for a new trial was denied and the defendant appealed from the judgment and order.

The case turned upon Section 4902, C. L. 1913. That section reads:

"Every insurance company engaged in the business of insuring against loss by hail in this state, shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and hour the application for such insurance has been taken by the authorized local agent of said company, and if the company shall decline to write the insurance upon receipt of the application, it shall forthwith notify the applicant and agent who took the application, by telegram, and in that event, the insurance shall not become effective. Provided, that nothing in this article shall prevent the company from issuing a policy on such application and putting the insurance in force prior to the expiration of said twenty-four hours."

It is first claimed that as this statute imposes a liability outside of that which may be covered by an insurance policy or by a contract, it should be strictly construed, and when strictly construed it will be found to have no application to a proposal for insurance other than for a straight hail insurance policy. Since the application in question covers loss from all causes other than a few excepted ones, it is claimed that

the statute does not apply. We are of the opinion that there
184 is no merit in this contention as applied to the facts in this case, for the reason that the application was one for hail insurance as well as other insurance and the loss was occasioned through hail. To adopt the construction contended for by the appellant would readily lead to defeating the policy of the statute, which could be done by merely linking another insurance risk with hail insurance. The statute is clearly intended to cover all applications for hail insurance and this is such an application.

It is next argued that the statute violates the provisions of Article 1, Section 13 of the state constitution and the Fourteenth Amendment to the Federal constitution, in that it works a deprivation of liberty of contract and property without due process of law. It is said that the statute operates to
185 transform a mere proposal or offer into a completed contract obligation without affording to one of the parties thereto the option of acceptance or rejection. It is recognized that there is a class of obligations which are implied in law without regard to the assent of the party bound, but it is contended that the obligation imposed here is not properly included within such class. This contention must be examined in the light of the policy evidenced by the statute.

The business of insurance is subject to legislative regulation in the interest of the public. The regulations already prescribed by different legislative bodies indicate the broad scope of legislation designed to protect the public. Standard forms of policies are prescribed, investments regulated, deposit required, rates of premiums fixed (German Alliance Ins. Co. v.
186 Lewis, 233 U. S. 389); liability established for the amount of the policy regardless of the value of the property at the time of destruction (Orient Ins. Co. v. Daggs, 172 U. S. 577); defenses such as suicide may be cut off though expressly stipulated for in the policy (Whitfield v. Aetna Life Ins. Co. 205 U. S. 489). Upon similar principles we are of the opinion that the legislature can recognize other practices in connection with the insurance business which tend to operate prejudicially to the class of patrons and prescribe regulations for their protection. The statute in question recognizes the practical necessity for a prompt decision upon hail insurance applications. It is generally known that the premium covers the risk for the season and that the practice of writing hail insurance differs somewhat in this respect from other forms of insurance, where either an annual premium or a term rate is collected covering a risk for a definite period. An applicant for hail insurance is prone to rely upon his application being accepted

until notified to the contrary, and he will not ordinarily seek other insurance in the interim. Under the practice which, but 187
for the statute, could not be said to be unreasonable, the applicant for hail insurance would be uncertain as to whether or not his application was accepted, not only during the period of transmission but during the period required to notify him of the non-acceptance through agents selected by the company. It needs no argument to demonstrate that the employment of the usual means for completing the negotiations looking toward the issuance of a policy of insurance would frequently, in the absence of the statutory regulation, result in the disappointment of the applicant and would deprive him of the benefit of the insurance at a time when it is most needed and during which he would have reasonable grounds for believing that his risk was covered. Such would be his assurance, at any rate, that he would ordinarily refrain from ap- 188
plying elsewhere.

In recognition of the necessity for the prompt consumption of the business of hail insurance, the legislature has set a limit of twenty-four hours for the rejection of an application within which time the risk is not insured. In view of the peculiarities attaching to this form of insurance, we cannot say that this period is unreasonable. It would seem that foreign insurance companies, as well as domestic companies, could so arrange their methods of transacting business in the state as to enable them to pass definitely upon the desirability of any given risk within twenty-four hours after the date of the application, notifying the applicant and the agent in case of rejection as required. The statute imposes this duty and we think it within the province of the legislature to so pro- 189
vide. It holds the company liable for the insurance applied for. The measure of liability for a breach of the duty imposed is fixed. This liability, in our judgment, is sustainable upon the same principle that liability in other directions is sustained for breaches of various duties that may properly be imposed by the legislature. Thus, carriers may be required to fence their rights of way, to keep them clear of combustible material, provide spark arresters for their locomotives, and to install safety devices. Telegraph companies may be required to transmit messages in a certain order or priority and with promptness. (See 33 Cyc. 677; Atchinson, Topeka Ry. Co. v. Matthews, 174 U. S. 96.) Insurance companies may be required to make prompt settlement for losses. (Fidelity Ins. Co. v. Metlin, 185 U. S. 309; Farmers & Merchants Ins. Co. v. Dobney, 189 U. S. 301.) And for the failure to perform the duties imposed, penalties may be provided in the shape of at-

torneys' fees or added damages, recoverable by the party af-
190 fected. (See cases, supra.)

The statute under consideration here is not as rigorous as some that were sustained in the foregoing cases, in that a recovery is more nearly commensurate with the loss attributable to a breach of the duty.

It is contended, however, that the applicant waived the benefit of the statute by signing an application in which it was expressly agreed that the insurance should take effect from the date the application was received and accepted at the Waseca, Minnesota, agency of the company. The general principle that an individual may waive the provisions of a statute intended for his benefit is invoked. We are of the opinion, however, that the principle is not applicable in the instant case. The statute, as we view it, was designed to impose the duty of
191 prompt action upon all companies transacting hail insurance business in this state. To permit an extension of the time for rejection to be effected through language contained in the application would result in relieving the companies of the duty which is specifically enjoined upon them and thus defeat the policy of the statute. As hereinbefore indicated the statute is a police regulation of hail insurance business prescribed by the competent legislative authority. We should and do hesitate to read into the law implications which would make the effectiveness of such regulation dependent upon private contract. Had it been desired to leave the matter to the contract of the parties, no such statute would have been enacted, or, if enacted, it would doubtless have been qualified by some such expression as the following:

192 "Unless otherwise provided in the application, every insurance company engaged in the business of insurance against loss by hail in this state shall be bound and the insurance shall take effect from and after twenty-four hours after the day and hour of application," etc.

Section 4902, C. L. 1913, in our opinion, to the extent of its provisions, controls the form of an application for hail insurance, just as other sections control standard policy forms, and any departure from the prescribed forms involving less favorable terms to the applicant or policy holder is an infringement of the statute and is void.

No other constitutional question is raised.

The judgment and order appealed from are affirmed.

L. E. Birdzell,
A. M. CHRISTIANSON,
RICHARD M. GRACE,
H. A. BRONSON.

Wanberg v. Insurance Co.

Robinson, J.: (Dissenting): This is an appeal from a judgment of $1500 against defendant on a mere application for hail and other insurance. On July 12, 1917, at Tioga, N. D., the plaintiff gave to Gus. W. Everson, a local agent of the defendant, an application for hail and other insurance. It reads in part: 193

"I, Robert Wanberg, of Tioga, County of Williams, N. D. hereby make application for insurance to take effect from the day this application is received and accepted, as evidenced by the issuing of a policy thereon at Waseca, Minnesota agency of the company."

The application was duly made to defendant at Waseca, Minnesota. Before the application could possibly arrive at Waseca the crop was destroyed by hail. Without knowledge of the loss the company promptly rejected and returned the application with a deposit check sent as premium. Do these facts constitute a cause of action? The plaintiff relies on a statute which reads thus: "Every insurance company engaged in the business of insurance against loss by hail in this state shall be bound and the insurance shall take effect from and after twenty-four hours from the day and hour the application for such insurance has been taken by the authorized local agent of the company." The title of the act is "An Act Fixing the Time when Policies of Hail Insurance Shall Take Effect." The title refers to "The Time when Policies of Hail Insurance Shall Take Effect," and not to a time when an application for insurance shall ripen into a policy. Hence, under Section 61 of the constitution, the act is void because the title does not express the subject of the act; but aside from this defect in the title, the act should not be so construed so as to deny parties the right to make reasonable contracts or to turn into a contract a mere application for a contract. Here the plaintiff made and sent a written application for insurance "to take effect from the day the application is received and accepted," and not for a policy to become effective within twenty-four hours after the date of the application. 194 195

If the statute be so construed as to deny the validity of such a contract and to impose on defendant a contractual obligation to pay $1500 when it made no such contract, then, the statute does impair the obligation of contracts and it deprives the defendant of its property without due process of law. It is in no way competent for the lawmakers to say that a mere

196 application for a contract shall itself constitute a contract. But the statute goes still further; it makes the contract. It declares that within twenty-four hours after an application for insurance is received by a local agent the application shall become a policy of insurance, even though not received by the company. It does not give the company a reasonable time to receive or reject the application, even if it were to have a general office in every city of the state. Surely that is contrary to every principle of law.

J. E. ROBINSON,
Judge.

STATE OF N
County of

NATIONAL U

Judgment Debtors	Judgment Creditors	Court	Date of Judgr Month	Day	Y
National Union Fire Insurance Company of Pittsburg, Pa., a foreign insurance corporation	Robert Wanberg	District	Nov.	26	1

STATE OF NORTH DAKOTA,
County of Williams.

I, J. O. Lei
a true and corr
Union Fire Ins.
In Testimo
31st day of De

(Seal.)

TH DAKOTA,
illiams,

IN DISTRICT COURT
Eleventh Judicial District.

ROBERT WANBERG,

Plaintiff,

vs.

ON FIRE INSURANCE COMPANY of Pittsburg, Pa., a foreign corporation,

Defendant.

TRANSCRIPT OF JUDGMENT.

Date of Filing					Date of Docketing					Damages		Costs		Amount		Page Judgmt Book	Attorneys for Judgement Creditor
Month	Day	Year	A.M.	P.M.	Month	Day	Year	A.M.	P.M.	Dols.	Cts.	Dols.	Cts.	Dols.	Cts.		
Nov.	26	1919		4	Nov.	26	1919		4	1405	85	~~110~~	~~80~~	~~1510~~	~~65~~	F	Wm. G. Owens
					Retaxed 12/6-1919							88	30	1494	15		
					Supreme Court Costs									20	00		
														———	——		
														$1514	15		

t, Clerk of the District Court in and for said County of Williams and State of North Dakota, do hereby certify that the above is
t transcript of the original Docket Entry of Judgment in the action wherein Robert Wanberg was and is Plaintiff and Nat.
o. was and is Defendant, as the same appears of record in my office.
Whereof, I have hereunto set my hand and affixed the seal of said Court in the City of Williston in said County and State this
A. D. 1920.

J. O. LEIBERT,
Clerk.

IN SUPREME COURT,
STATE OF NORTH DAKOTA. 197

ROBERT WANBERG,
Plaintiff and Respondent,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, a foreign corporation,
Defendant and Appellant.

PETITION FOR WRIT OF ERROR.

To the Honorable A. M. Chirstianson, Chief Justice of the Supreme Court of the State of North Dakota:

The petition of National Union Fire Insurance Company, a corporation under the laws of the Commonwealth of Pennsylvania, defendant in the Court below and appellant in the Supreme Court of the State of North Dakota, respectfully shows: 198

That there is error in the record of proceedings in this cause in the Supreme Court of the State of North Dakota, which is the highest Court of law and equity of the State of North Dakota in which a decision can be had in this controversy,—in that the said Court has, on October 16th, 1920, rendered a decision affirming a judgment theretofore rendered and docketed in and by the District Court in and for the County of Williams and State of North Dakota against petitioner herein; and this petitioner respectfully shows that in the decision and judgment, the error in which is herein complained of, there was drawn in question the validity of a Statute of the State of North Dakota, namely, Section 4902, Compiled Laws of North Dakota, 1913, on the ground of its being repugnant to, 199 and in contravention of the Fourteenth Amendment of the Constitution of the United States, the said decision and judgment being in favor of the validity of said Statute,—contrary to the contention of petitioner; and that by the Motion for Judgment, duly made and interposed by petitioner in this cause, and other proceedings in said cause, a right, privilege and immunity were especially set up and claimed by petitioner and appellant under the Constitution of the United States, and the said decision in this Court is against such right, privilege and immunity; all of which appears in the record and proceedings in this suit, whereby manifest error has happened to the great damage of appellant, as shown more in detail by the assignment of errors filed with this petition.

Wherefore, said petitioner and appellant, National Union Fire Insurance Company, a corporation as aforesaid, prays for an allowance of a writ of error and such other process

as may cause the said error to be corrected by the Supreme
200 Court of the United States, and for a reversal of the judgment in said action.

Dated December 18th, 1920.

NATHAN H. CHASE and W. H. BARNETT,
Attorneys for Petitioner and Appellant,
First National Bank Building,
Fargo, North Dakota.

STATE OF MINNESOTA,
ss.
County of Hennepin.

Nathan H. Chase, being first duly sworn on oath says: That he is one of the attorneys for the petitioner above named; that he has read the petition and knows the contents thereof and that the same is true to the best of affiant's knowledge and be-
201 lief.

NATHAN H. CHASE.

Subscribed and sworn to before me this 18th day of December, 1920.

(Notarial Seal.)

SAM J. LEVY,
Notary Public, Hennepin County, Minnesota.
My commission expires August 18th, 1923.

Endorsed: Filed December 31, 1920.

J. H. NEWTON,
Clerk.

IN SUPREME COURT,
STATE OF NORTH DAKOTA.

202

ROBERT WANBERG,
Plaintiff and Defendant in Error,
vs.
NATIONAL UNION FIRE INSURANCE COMPANY, a foreign corporation,
Defendant and Plaintiff in Error.

ASSIGNMENTS OF ERROR.

National Union Fire Insurance Company, a corporation, Plaintiff in Error in the above entitled cause, files herewith its petition for a writ of error and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of North Dakota erred to the grievous injury anl wrong of the Plaintiff in Error, and to the prejudice and against the rights of the Plaintiff in Error herein, in the following particulars, to-wit:

1. The Supreme Court of the State of North Dakota erred in holding and deciding that Section 4902, Compiled Laws of North Dakota, 1913, is within the police power of the State, and does not deprive insurance companies, including Plaintiff in Error, of the liberty of contract, or property, without due process of law. 203

2. The Supreme Court of the State of North Dakota erred in holding and deciding that said Section 4902, Compiled Laws of North Dakota, 1913, was valid, and was not in conflict with the Constitution of the United States, as being repugnant to, and violative of, the Fourteenth Amendment of the Constitution of the United States, in that said section operated to deprive insurance companies, including Plaintiff in Error, of liberty, viz., the right to contract, without due process of law.

3. The Supreme Court of the State of North Dakota erred in holding and deciding that said Section 4902, Compiled Laws of North Dakota, 1913, was valid, and was not in conflict with the Constitution of the United States, as being repugnant to, and violative of, the Fourteenth Amendment of the Constitution of the United States, in that said section operated to deprive insurance companies, including Plaintiff in Error, of a property right, viz., the right to contract, without due process of law. 204

4. The Supreme Court of the State of North Dakota erred in holding and deciding that Section 4902, Compiled Laws of North Dakota, 1913, was valid, and was not in conflict with the Constitution of the United States, as being repugnant to, and violative of, the Fourteenth Amendment of the Constitution of the United States, in that said section operated to deprive insurance companies, including Plaintiff in Error, of property, without due process of law. 205

5. The Supreme Court of the State of North Dakota erred in holding and deciding that said Section 4902, Compiled Laws of North Dakota, 1913, is a valid and legal exercise of the police power of the State of North Dakota.

6. The Supreme Court of the State of North Dakota erred in affirming the judgment theretofore rendered and docketed in said cause in favor of defendant in error herein and against plaintiff in error herein.

7. The Supreme Court of the State of North Dakota erred in not reversing the judgment hertofore rendered and docketed in favor of defendant in error herein and against plaintiff in error herein, and in not ordering and decreeing judgment in favor of plaintiff in error herein, and against defendant in error herein.

206 Wherefore, and for these and other manifest errors appearing in the record, said National Union Fire Insurance Company, Plaintiff in Error, prays that the said decision and judgment of said Supreme Court of the State of North Dakota, dated October 16th, 1920, be reversed and that it have judgment for its costs.

Dated December 18th, 1920.

NATHAN H. CHASE and W. H. BARNETT,
Attorneys for National Union Fire Insurance Company, Plaintiff in Error,
First National Bank Building,
Fargo, North Dakota.

Endorsed: Filed, December 31, 1920.

J. H. NEWTON,
Clerk.

207

IN SUPREME COURT,
STATE OF NORTH DAKOTA.

ROBERT WANBERG,
Plaintiff and Respondent.

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, a foreign corporation,
Defendant and Appellant.

ORDER OF COURT ALLOWING WRIT OF ERROR.

In this cause application having been made to me, as Chief Justice of the Supreme Court of the State of North Dakota,
208 that being the highest Court of record in this State in which said cause can be heard, for the allowance of a writ of error to remove said cause to the Supreme Court of the United States for review in accordance with the Constitution and laws of the United States and rules of practice of the Supreme Court of the United States, and for fixing and approving the bond on removal of the said cause to the Supreme Court of the United States;

It is hereby ordered, This 29th day of December, 1920, that said writ of error be, and the same hereby is, allowed and that the same may be issued by any officer authorized to issue the same, and that said appellant, National Union Fire Insurance Company, give undertaking in the sum of $5000.00 to respondent herein, with qualified sureties thereon, conditioned that said National Union Fire Insurance Company shall prosecute its writ of error to effect and answer all damages and costs that may be adjudged, and shall pay any final judgment

rendered in said action, if it fails to make good its plea, which 209
said undertaking, when duly approved, shall operate as a supersedeas.

Dated December 29, 1920.

A. M. CHRISTIANSON,
Chief Justice of the Supreme Court of
the State of North Dakota.

Endorsed: Filed December 31, 1920.

J. H. NEWTON,
Clerk.

IN SUPREME COURT,
STATE OF NORTH DAKOTA.

ROBERT WANBERG,
Plaintiff and Respondent, 210

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, a foreign corporation,

Defendant and Appellant.

UNDERTAKING AND APPROVAL THEREON.

Whereas, At the September, 1920, Term of the Supreme Court of the State of North Dakota, in a suit pending in said Court between Robert Wanberg, plaintiff-respondent, and the above named National Union Fire Insurance Company, defendant-appellant, the final decree and decision was rendered against said appellant on October 16th, 1920, and the said appellant having obtained a writ of error and filed a copy thereof in the office of said court to reverse the decree and decision in the aforesaid suit, and a Citation directed to the said Rob- 211
ert Wanberg, citing and admonishing him to be and appear at a Supreme Court of the United States at Washington, within thirty (30) days from the date hereof;

Now, therefore, American Surety Company of New York, does undertake, promise and agree to and with said Robert Wanberg, plaintiff-respondent herein, that the said National Union Fire Insurance Company, defendant-appellant herein, shall prosecute its writ of error to effect and answer all damages and costs that may be adjudged, if it shall fail to make said plea or appeal good, and shall pay any final judgment

rendered in said action, not exceeding the sum of Five Thou-
212 sand Dollars.

Dated December 29, 1920.

AMERICAN SURETY COMPANY OF NEW YORK,
By HERBERT L. LOOMIS,
Resident Vice President.
(Corporate Seal)
Attest: W. H. SHURE,
Resident Assistant Secretary.

STATE OF NORTH DAKOTA, } ss.
County of Cass. }

On this 29 day of December, 1920, before me personally appeared Herbert L. Loomis and W. H. Shure, to me personally known, who, being by me each duly sworn, did say on oath:
213 That they are the Resident Vice President and the Resident Assistant Secretary, respectively, of the American Surety Company of New York, the corporation described in and which executed the foregoing instrument; that the seal affixed to said instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and said Herbert L. Loomis and W. H. Shure each acknowledged the said instrument to be the free act and deed of said corporation.

B. F. SPALDING,
Notary Public, County of Cass, No. Dak.
My commission expires Sept. 20, 1924.
(Notarial Seal.)

The foregoing and within undertaking is hereby approved
214 this 29 day of December, 1920.

A. M. CHRISTIANSON,
Chief Justice of the Supreme
Court of the State of North Dakota.

Endorsed: Filed December 31, 1920.

J. H. NEWTON,
Clerk.

WRIT OF ERROR.

UNITED STATES OF AMERICA——ss.

The President of the United States of America:

To the Honorable the Judges of the Supreme Court of the State of North Dakota, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court, before you, at the September Term, 1920, thereof, between Robert Wanberg, Plaintiff, and National Union Fire

Insurance Company, a corporation, Defendant, manifest error hath happened, to the great damage of said National Union 215
Fire Insurance Company, a corporation, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command You, if judgment be therein given, and then, under your seal, distinctly anl openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the Capitol in the City of Washington, District of Columbia, and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 15th day of February, 1921, to the end that the record and proceedings afore- 216
said, being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, The Honorable Edward D. White, Chief Justice of the United States, this 30th day of December, 1920.

Issued at office in Fargo, North Dakota, with the seal of the District Court of the United States for the District of North Dakota, Southeastern Division.

(Seal of United States District Court of North Dakota, Southeastern Division.)

J. A. MONTGOMERY,
Clerk of the District Court of the United States of America
for the District of North Dakota. 217

(Seal.)

Allowed by A. M. Christianson, Chief Justice of the Supreme Court of North Dakota.

Endorsed: Filed December 31, 1920.

J. H. NEWTON,
Clerk.

IN SUPREME COURT,
STATE OF NORTH DAKOTA.

ROBERT WANBERG,
Defendant in Error,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, a foreign corporation,
Plaintiff in Error.

CITATION.

218 To Robert Wanberg:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of North Dakota, in suit wherein National Union Fire Insurance Company, a corporation, is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the decision and judgment rendered against the said Plaintiff in Error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable A. M. Christianson, Chief Justice of the Supreme Court of the State of North Dakota, this 31st
219 day of December, 1920.

A. M. CHRISTIANSON,
Chief Justice of the Supreme Court of the State of North Dakota.

Due and personal service of the within Citation admitted this 31st day of December, 1920.

Wm. G. OWENS,
Attorney for Robert Wanberg.

Endorsed: Filed January 7, 1921.

J. H. NEWTON,
Clerk.

RETURN TO WRIT.

UNITED STATES OF AMERICA,
220 ss.
Supreme Court of North Dakota.

In obediance to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record anl proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of North Dakota, at my office in the city of Bismarck, North Dakota, this 10½ day of January, 1921.

(Seal of the Supreme Court of North Dakota.)

J. H. NEWTON,
Clerk of Supreme Court of North Dakota.

IN SUPREME COURT
STATE OF NORTH DAKOTA. 221

ROBERT WANBERG,
Plaintiff-Respondent,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, a foreign corporation,
Defendant-Appellant,

STIPULATION.

It is hereby stipulated, That the following parts of the Record herein are deemed necessary for the consideration of this cause by the Supreme Court of the United States, and that the same may be incorporated into the transcript of the record and printed for that purpose, to-wit:

1. Petition for Writ of Error. 222
2. Assignments of Error.
3. Order Allowing Writ of Error.
4. Undertaking and Approval.
5. Writ of Error and Return thereon.
6. Citation and Proof of Service thereof.
7. Record from the District Court of Williams County, North Dakota, showing all proceedings in that court contained in appellant's record in the Supreme Court of North Dakota, viz:
   (a) Summons.
   (b) Complaint.
   (c) Answer.
   (d) Transcript, or settled case.
   (e) Findings, conclusions of law, and order for judgment. 228
   (f) Judgment.
   (g) Motion for judgment or for a new trial.
   (h) Order denying above motion.
   (i) Notice of appeal.
   (j) Undertaking.
   (k) Specification of errors.
   (l) Specification of insufficiency.
   (m) Specification of facts ultimately established.
8. Opinion of Supreme Court.
9. Final Judgment.

Dated December 29, 1920

WILLIAM G. OWENS,
Attorney for Plaintiff-Respondent.
NATHAN H. CHASE and W. H. BARNETT,
Attorney for Defendant-Appellant.

Endorsed: Filed January 10, 1921.

J. H. NEWTON.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Dakota, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court, before you, at the September Term, 1920, thereof, between Robert Wanberg, Plaintiff, and National Union Fire Insurance Company, a corporation, Defendant, manifest error hath happened, to the great damage of said National Union Fire Insurance Company, a corporation, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command You, if judgment be therein given, *and* then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the Capitol in the City of Washington, District of Columbia, and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 15th day of February, 1921, to the end that the record and proceedings aforesaid, being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, The Honorable Edward D. White, Chief Justice of the United States, this 30th day of December, 1920.

Issued at office in Fargo, North Dakota, with the seal of the District Court of the United States for the District of North Dakota, Southeastern Division.

[Seal United States District Court, North Dakota.]

J. A. MONTGOMERY,
Clerk of the District Court of the United States of America for the District of North Dakota.

Allowed by A. M. Christianson, Chief Justice of the Supreme Court of North Dakota.

Allowed:

A. M. CHRISTIANSON,
Chief Justice Supreme Court North Dakota.

It appearing that it will be impossible to have the transcript on appeal on file with the Clerk of the United States Supreme Court within the time provided for in the foregoing writ of error, it is

Ordered, That the time for making return to such writ be extended until February 25, 1921.

JAMES E. ROBINSON,
Chief Justice.
A. M. CHRISTIANSON.

Feb. 15, 1921.

Return to Writ.

UNITED STATES OF AMERICA, *ss:*

Supreme Court of North Dakota.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name, and affix the seal of said Supreme Court of North Dakota, at my office, in the city of Bismarck, North Dakota, this — day of December, 1920.

——— ———,
Clerk Supreme Court of North Dakota.

[Endorsed:] In Supreme Court State of North Dakota. Robert Wanberg, Plaintiff and Defendant in Error, vs. National Union Fire Insurance Company, a foreign corporation, Defendant and Plaintiff in Error. Writ of Error and Return. 3960. Filed Dec. 31, 1920.

In Supreme Court, State of North Dakota.

ROBERT WANBERG, Defendant in Error,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, a Foreign Corporation, Plaintiff in Error.

Citation.

To Robert Wanberg:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of North Dakota, in suit wherein National Union Fire Insurance Company, a corporation, is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the decision and judgment rendered against the said Plaintiff in Error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable A. M. Christianson, Chief Justice of the Supreme Court of the State of North Dakota, this 29th day of December, 1920.

A. M. CHRISTIANSON,
Chief Justice of the Supreme Court of the State of North Dakota.

Due and personal service of the within Citation admitted this 31 day of December, 1920.

WM. G. OWENS,
Attorney for Robert Wanberg.

[Endorsed:] In Supreme Court, State of North Dakota. Robert Wanberg, Defendant in Error, vs. National Union Fire Insurance Company, a foreign corporation, Plaintiff in Error. Citation. 3960. Filed Jan. 7, 1921.

Endorsed on cover: File No. 28114. North Dakota Supreme Court. Term No. 233. National Union Fire Insurance Company, plaintiff in error, vs. Robert Wanberg. Filed February 25th, 1921. File No. 28114.

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Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 233.

NATIONAL UNION FIRE INSURANCE COMPANY,
Plaintiff in Error,

vs.

ROBERT WANBERG,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

Brief for Plaintiff in Error.

Writ of error to review a judgment of the Supreme Court of the state of North Dakota, entered on October 16th, 1920, affirming a judgment of the District Court of Williams county of that state, rendered in favor of defendant in error on November 26th, 1919; in the sum of $1,514.15 (R., 60, 66½).

STATEMENT OF THE CASE.

Action by Robert Wanberg to recover $1,254.25, together with interest and costs, upon an alleged contract of hail insurance.

The facts upon which this action was brought may be

summarized as follows:

At ten o'clock in the forenoon of July 12th, 1917, in the vicinity of Tioga, North Dakota, Robert Wanberg signed and delivered to one Everson an application (on a blank furnished by the insurance company) for insurance on his crops, in the sum of $1,400.00, against loss or damage by hail and other causes therein enumerated; paying the stipulated premium of $140.00 (R., 6). At that time Everson was an agent of the insurance company, plaintiff in error, at Tioga, with authority merely to solicit and receive applications for insurance of the character indicated, receive the premium therefor, and transmit the applications to the company's western office at Waseca, Minnesota; at which point applications were acted upon, and policies issued. At the time of making this application the insurance company was, and for a number of years prior thereto had been, duly licensed to transact, and in fact transacting, its corporate business in said state.

On the afternoon of July 13th, 1917, Everson mailed this application, together with others of same character, to the Waseca, Minn. office of the company, where it arrived on Sunday, July 15th, and was delivered on Monday, the 16th. A remittance for the premiums, less agent's commission, accompanied the applications.

In the meantime, and at about six o'clock in the evening of July 14th, a hail storm occurred in the vicinity of Tioga, resulting in loss and damage to Wanberg's growing crops in the amount demanded in the complaint.

On Tuesday, July 17th, and before learning of the occurrence of the loss, or of the storm, the Waseca agency of the company mailed back to Everson the applications of Wanberg and others, so received by it on Monday, to-

gether with the draft for the premiums; stating that applications for crop insurance would not be accepted at that late date.

The foregoing statement is substantiated by the stipulation entered into immediately preceding the trial (R., 16), and by the findings of the trial court (R., 48).

The company having refused to pay Wanberg's claim, and having denied liability, Wanberg brought this action; taking the position that although no policy whatsoever had ever been issued by the company, or his application accepted, his rights and claim were enforceable under Section 4902 of the Compiled Laws of North Dakota, 1913, providing as follows:

> "Every insurance company engaged in the business of insuring against loss by hail in this state, shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and the hour the application for insurance has been taken by the authorized local agent of said company, and if the company shall decline to write the insurance upon receipt of the application, it shall forthwith notify the applicant and agent who took the application, by telegram, and in that event, the insurance shall not become effective. Provided, that nothing in this article shall prevent the company from issuing a policy on such application and putting the insurance in force prior to the expiration of said twenty-four hours."

As finally determined by the facts stipulated prior to the trial (R., 16) the company's defenses, as indicated by its motion for judgment at the close of all of the testimony (R., 47) were based upon the following grounds:

First: That the provisions of Section 4902, Compiled Laws of North Dakota, 1913, did not apply to an application for insurance, of the form and character herein under consideration.

Second: That in so far as the provisions of said Section 4902 in anywise tended or operated to control, qualify, avoid, or nullify the express provision contained in said application,—that it should take effect from the day it was received and accepted, as evidence by the issuance of a policy thereon, at the Waseca, Minnesota agency for said defendant,—said Section 4902 was repugnant to and in violation of the 13th Section of Article I of the Constitution of the state of North Dakota, and the 14th Amendment of the Constitution of the United States, in that it expressly operated to deprive this defendant of liberty or freedom to contract, of property without due process of law, and of the equal protection of the laws; and, further, was unreasonable in its requirements; and was therefore and consequently null and void.

Third: That by the act of making, signing and delivering said application plaintiff expressly and wholly waived all and several the provisions and conditions set forth in said Section 4902.

Fourth: That the stipulated facts, and testimony offered and received in behalf of plaintiff, wholly failed in showing or establishing any contract of insurance between plaintiff and defendant herein.

The case was tried by the court, without a jury, resulting in a decision in Wanberg's favor; predicated wholly on the provisions of the aforesaid Section 4902 of the North Dakota Code (R., 48-52).

Judgment having been entered, a case was settled and the insurance company moved for judgment or for a new trial. This motion having been denied an appeal was taken to the Supreme Court of North Dakota, being the court of last resort in the state, from the judgment thus entered

and from the order of the trial court denying the company's motion for judgment or a new trial; the defendant company assigning as error, among other things, that the trial court erred in holding, as a conclusion of law, that said Section 4902 was constitutional and valid (R., 57).

On October 16th, 1920, the Supreme Court of North Dakota filed its opinion affirming the judgment (R., 60-64), and,—there being no provision under the laws of that state for entry of judgment, in such case, in that court, the costs therein were entered in the original judgment in the District Court (R., 66½).

In the majority opinion the State Supreme Court held in effect that Section 4902 was a valid exercise of the police power of the state and did not deprive the insurance company of liberty of contract or property without due process of law.

In support of this holding it was stated that the business of insurance was subject to legislative regulation in the interest of the public, that the statute in question recognized the practical necessity for a prompt decision upon hail insurance applications, that the employment of the usual means for completing negotiations looking to the issuance of a policy would frequently result in the disappointment of the applicant and deprive him of the benefit of the insurance at a time when most needed and during which he would have reasonable grounds for believing that his risk was covered, and that in recognition of the necessity for the prompt consummation of the business of hail insurance the legislature had set a limit of twenty-four hours for the rejection of an application, within which time the risk was not insured, and that in view of the peculiarities attaching to this form of insurance the court

could not say that this period was unreasonable (R., 62, 63).

From the final judgment of the Supreme Court of North Dakota, rendered and entered as aforesaid, the insurance company, plaintiff in error, brings the case on error to this court, and assigns the following errors in the judgment and decision of the Supreme Court of the state of North Dakota:

ASSIGNMENT OF ERRORS.

1. The Supreme Court of the state of North Dakota erred in holding and deciding that Section 4902, Compiled Laws of North Dakota, 1913, is within the police power of the state, and does not deprive insurance companies, including plaintiff in error, of the liberty of contract, or property, without due process of law.

2. The Supreme Court of the state of North Dakota erred in holding and deciding that said Section 4902, Compiled Laws of North Dakota, 1913, was valid, and was not in conflict with the Constitution of the United States, as being repugnant to, and violative of, the Fourteenth Amendment of the Constitution of the United States, in that said section operated to deprive insurance companies, including plaintiff in error, of liberty, viz., the right to contract, without due process of law.

3. The Supreme Court of the state of North Dakota erred in holding and deciding that said Section 4902, Compiled Laws of North Dakota, 1913, was valid, and was not in conflict with the Constitution of the United States, as being repugnant to, and violative of, the Fourteenth Amendment of the Constitution of the United States, in

that said section operated to deprive insurance companies, including plaintiff in error, of a property right, viz., the right to contract, without due process of law.

4. The Supreme Court of the state of North Dakota erred in holding and deciding that Section 4902, Compiled Laws of North Dakota, 1913, was valid, and was not in conflict with the Constitution of the United States, as being repugnant to, and violative of, the Fourteenth Amendment of the Constitution of the United States, in that said section operated to deprive insurance companies, including plaintiff in error, of property, without due process of law.

5. The Supreme Court of the state of North Dakota erred in holding and deciding that said Section 4902, Compiled Laws of North Dakota, 1913, is a valid and legal exercise of the police power of the state of North Dakota.

6. The Supreme Court of the state of North Dakota erred in affirming the judgment theretofore rendered and docketed in said cause in favor of defendant in error herein and against plaintiff in error herein.

7. The Supreme Court of the state of North Dakota erred in not reversing the judgment heretofore rendered and docketed in favor of defendant in error herein and against plaintiff in error herein, and in not ordering and decreeing judgment in favor of plaintiff in error herein, and against defendant in error herein.

ARGUMENT.

Assignments 1-7.

For the sake of brevity these several assignments may be considered together.

I.

The Supreme Court of North Dakota having held that Section 4902 applied to and covered applications for insurance covering losses from other causes than hail, where loss from hail was one of the risks involved, and having further held that the provisions of the statute in question could not be waived by express agreement to that effect between the applicant and the insurance company, the inquiry involved in this writ of error narrows down to a consideration of whether or not the North Dakota statute in question is unconstitutional and void under the provisions of the 14th Amendment of the Constitution of the United States referred to and set forth in the several assignments of error.

In view of the fact that North Dakota Supreme Court construed this statute as applying to an application for insurance embracing other risks in addition to that of hail, and as the loss in question actually resulted from hail, we are warranted in treating the statute as applying to applications for all kinds of insurance, where indemnity against loss by hail is one of the risks sought to be covered.

In view of the conditions disclosed by the record, relative to train service, etc., it requires no argument to demonstrate that the statute necessarily operates in numerous instances to transform a mere proposal or offer,—after the lapse of twenty-four hours,—into a completed contract and obligation, irrespective of whether the party to whom the application is addressed has been accorded the option or privilege of acceptance or rejection thereof.

It is true that *quasi*, or constructive, contracts, are known in the law; being a class of obligations that are imposed or created by law, without regard to the assent of

the party bound, on the ground that they are dictated by reason and justice.

Among instances of contracts of this character are cases in which one person has received money which another person ought to have received, and which the latter is allowed to recover from the former in an action for money had and received; cases in which one person has been compelled to pay money which another ought to have paid, and which he is allowed to recover from the latter in an action of assumpsit for money paid to his use; cases of account stated, from which the law implies a promise that will support an action; cases where a person, by unlawfully appropriating property to his own use, becomes liable to pay the owner the reasonable value thereof; and cases where a person fails to deliver specific property and becomes liable for the money value thereof.

Concerning this class of contracts, implied in law, it has been said that they rest upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. That in truth they are not contracts or promises at all, but are merely obligations which the law creates, in absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person, money, or its equivalent, under such circumstances that in equity and in good conscience he ought not to retain it.

It is likewise true that there are cases in which an obligation to pay money is imposed by statute, as in the case of a statutory provision making the estate of an insane person liable for expense of treatment and maintenance of such person in any county or state institution, *Meade Co. v. Welch*, 34 S. D. 348, 148 N. W. 601; or one making a

school district liable under certain circumstances for tuition of pupils attending school in a neighboring school district, *Yankton Board of Education v. Yankton County School District*, 23 S. D. 429, 122 N. W. 411; and one making a state liable for support furnished by a town to a non-resident pauper, *Milford v. Commonwealth*, 144 Mass. 64, 10 N. E. 516, and similar statutes.

Neither of these instances, nor the principles upon which they rest, have any semblance or analogy to the obligation created and imposed by Section 4902, as they all proceed upon the theory that one person has received something which in equity belongs to another, or, in cases of liability imposed by statute, that services have been rendered under such circumstances as to create and justify a valid claim for reimbursement.

It is of course evident at the outset that the purpose and effect of the statute under consideration is in absolute derrogation of the common law, as a mere application or proposal does not constitute or effect a contract without the accompanying feature or act of acceptance; and it is also true that in case of an application or proposal of the character herein involved, acceptance must necessarily be evidenced by some act or word by the party to whom the offer is made; mere silence not amounting to an acceptance.

Brink v. Ins. Co., 17 S. D. 235, 95 N. W. 929.
Heiman v. Ins. Co., 17 Minn. 153.
Lowe v. Ins. Co., 80 Neb. 499, 114 N. W. 586.
Ins. Co. v. Rudolph, 45 Tex. 454.
More v. Ins. Co., 130 N. Y. 537, 20 N. E. 757.
Ins. Co. v. Babcock, 104 Ga. 67.
Cases cited in 9 Am. & Eng. Ann. Cas., p. 221.

In *Brink v. Ins. Co., supra,* the trial court, in charging the jury, used the following language:

> "Should you further find that this application for insurance was regularly made by the plaintiffs, and that the premium for the same was paid, and that this application was duly received by the company, but was laid aside, unanswered and unopened, for such a length of time as would have permitted or allowed the company, by the exercise of reasonable diligence, to have passed upon it, and either accepted or rejected it, you will then consider the case the same as if the policy had been issued by the company."

In reversing the judgment entered upon the verdict necessarily resulting from such a charge, the court said:

> "It should be observed that this is an action against the insurance company itself, and that plaintiffs' right to recover *must rest on a contract of insurance.* It is not, as were the cases of *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726, and *Minneapolis Threshing Machine Co. v. Darnall*, 13 S. D. 279, 83 N. W. 266, an action for damages resulting from the failure to procure insurance by one who had agreed to do so. A contract of insurance is not complete without a meeting of the minds of the parties in respect to the following particulars: The sum to be insured, the time when the insurance is to begin and terminate, the subject to be insured and the consideration. *Ostrander on Insurance*, Sec. 33. If there was no meeting of the minds of the parties in respect to the essential elements of a contract of insurance when the application and premium were received by the agent, such a contract never existed, unless the conduct of the defendant shall be construed as an acceptance of the application. It may be assumed, as the jury found, that the delay in accepting or rejecting the application was unreasonable, but it would certainly be illogical to assert that the failure of the defendant to either accept or reject the plaintiffs' application for any length of time constituted an acceptance of, and consent to, the terms proposed by the plaintiffs. There was no contract, simply because there never was any acceptance of the application on

> the part of the defendant. Our attention has been called to no decision wherein mere delay in action upon an application for insurance is construed as equivalent to an acceptance. *Contracts are not created without consent.* Failure of the defendant to manifest its approval of the plaintiffs' application within a reasonable time should, we think be regarded as evidence of its rejection, rather than of its acceptance." (Italics ours.)

The rule thus laid down is equally true though the offer states that silence will be taken as consent.

13 C. J., p. 276, and cases cited.

And even in the exceptional cases wherein silence, or refusal to act one way or the other, has been held to amount to an acceptance by force of the existence of facts and circumstances imposing upon the offeree the obligation or duty to speak or act, the courts have uniformly held that *a reasonable time* is to be allowed the offeree in which to act.

13 C. J., p. 297, and cases cited.

This is of course apart from, and additional to, the rule that a statute, viewed from the standpoint of its constitutionality, must also be reasonable.

Adair v. U. S., 208 U. S. 161.

In re Wilshire, 103 Fed. 620.

It is true that statutes are not uncommon that provide in effect that *if* corporations of certain classes or character *enter into certain contracts* within a given state, those contracts shall be subject to certain provisions and requirements prescribed by the laws of such state.

As applied to insurance companies instances of this character are to be found in the case of *Orient Ins. Co. v. Daggs*, 172 U. S. 557, in which this court sustained the so-

termed valued policy law of the state of Missouri, providing that in case of total loss on buildings the insurer should be liable to the full amount of the policy, irrespective of the value of the property at the time of its destruction; the case of *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, in which this court sustained the validity of a statute of the state of Kansas, empowering the superintendent of insurance to prescribe and fix the rates at which fire insurance should be written in that state; the case of *Northwestern Nat'l Life Ins. Co. v. Riggs*, 203 U. S. 243, in which this court sustained the validity of a statute providing that no misrepresentation made in any application for a life insurance policy shall be material unless actually contributing to the contingency on which the policy is to become due; and the case of *Farmer's, etc. Ins. Co. v. Dobney*, 189 U. S. 301, sustaining a statutory requirement that insurance companies failing to pay a loss within a certain time shall, in addition to the amount thereof, pay a certain per cent by way of damage or attorney's fees.

But it is apparent that a marked distinction exists,—and must of necessity be made,—between that class of state legislation that in effect provides that *if* insurance companies *elect to make and enter into policy contracts within the state,* they shall be bound and governed by certain statutory conditions and requirements, and legislation that, in and of itself, *arbitrarily effects and makes a contract for and in behalf of the insurance company,* wholly and absolutely regardless of the company's option or desire in the premises, and without in anywise giving or affording it the privilege of accepting or rejecting the proposal made to it.

A somewhat extensive examination *fails to disclose any*

case having for consideration a statute that operated to create a contract, between persons, firms, or private corporations, irrespective and regardless of one of the parties thereto having been given any option in the matter, or of its disposition and willingness to enter into the same.

The argument may be advanced, at the outset, that the insurance company was in nowise obligated to continue to carry on or transact its corporate business in the state of North Dakota after the passage of Section 4902, unless it so desired; in other words, that if it did not desire to do business in the state under the conditions prescribed, it was at liberty to withdraw and go elsewhere.

In answer to a contention of this character this court, in *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 432, referred to the case of *Guillotte v. New Orleans*, 12 La. Ann. 432, wherein the Louisiana court sustained the right to fix prices for other than a commodity or service furnished by a public utility company, on the ground that if the baker did not desire to do business within the limits of a city that fixed the price of bread, he could go elsewhere; and then said:

> "That reasoning would support any statute, for every citizen at least has the right to go out of business. But it has been repeatedly held by this court that such an answer cannot sustain an invalid statute, the constitution being intended to secure the citizen against being driven out of business by an unconstitutional statute or regulation."

It was also held, in *San Francisco v. Liverpool and London and Globe Ins. Co.*, 74 Calif. 113, 15 Pac. 380, 5 Am. St. Rep. 425, that the insurance company did not waive the constitutional objection by continuing to do business in the state after the passage of the act therein involved;

which required foreign insurance companies doing business in the state to pay a percentage of all premiums received in the state, to the Firemen's Relief Fund of the county or city in which the insurance was effected.

It is provided by the 14th Amendment to the Federal Constitution that no state shall

> "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Corporations are "persons" within the meaning of this paragraph.

Home Ins. Co. v. New York, 134 U. S. 594, 606.
Pembina, etc. Co. v. Pa., 125 U. S. 181.
Minneapolis, etc. Ry. v. Beckwith, 129 U. S. 28.

While the "liberty" guaranteed by this amendment is the liberty of natural, not artificial, persons, *Western Turf Assoc. v. Greenberg*, 204 U. S. 359; *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U. S. 243, it has been repeatedly held that the privilege of contracting is both a liberty and a property right.

Allgeyer v. Louisiana, 165 U. S. 578, 591.
Yick Wo v. Hopkins, 118 U. S. 356.
Kuhn v. Detroit, 70 Mich. 534, 38 N. W. 470.
Coffeyville Brick Co. v. Perry, 69 Kans. 297, 76 Pac. 848.
Forer v. People, 141 Ill. 171; 31 N. E. 395.
Gillespie v. People, 188 Ill. 176, 58 N. E. 1007.
Mathews v. People, 202 Ill. 389; 67 N. E. 28.
State v. Julow, 129 Mich, 163, 31 S. W. 781.
State v. Goodwill, 33 W. Va. 179, 10 S. E. 288.

In *Allgeyer v. Louisiana, supra,* this court said:

> "In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto."

In *Coffeyville, etc. Co. v. Perry, supra,* the Kansas court said:

> "The right of property involves, as one of its essential attributes, the right, not only to contract, but also to terminate contracts.
>
> * * * * * * * * *
>
> If an owner cannot be deprived of his property without due process of law, he cannot be deprived of any of the essential attributes which belong to the right of property without due process of law."

In *Forer v. People, supra,* the Illinois court said:

> "The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property *in a manner which he has hitherto enjoyed under the law*, and which B, C and D are still allowed by the law to enjoy, it is clear *that he is deprived of both liberty and property to the extent that he is thus denied the right to contract.*"

It would thus appear to be settled that abridgement or prohibition of the right to make and enter into contracts of lawful character necessarily deprive the prohibited party of both liberty and property, in the sense that those terms are used in the constitutional clause under consideration. Likewise it would appear to require no argument to prove that *the right to refuse to enter into a contract* is equally as valuable a right as that of contracting, or terminating a contract.

Practically all of the cases that have come before this court, involving state statutes regulating, or seeking to regulate, the business of insurance, and especially as to

foreign companies duly licensed to transact business within the state, have been cases involving statutes *prohibiting* the entering into of certain contracts, or prohibiting the enforcement of certain contract conditions; while the statute under consideration in the case at bar operates to *impose a contract, nolens volens,* upon one of the parties.

Cases under this latter phase have not been cited *for the reason that no other statute of this character can be found,*—save its counterpart in South Dakota (Rev. Code 1919, Section 9196),—and consequently no case has arisen, that we are aware of, involving any such proposition. Moreover, the South Dakota legislature had the fairness, at least, to make the "probation period," so to speak, five days, instead of twenty-four hours, a feature that will be taken up later on.

In *Paul v. Virginia,* 8 Wall. 168, it was said that as corporations had no absolute right of recognition in other states, but depended for such recognition and the enforcement of their contracts upon the assent of such other states, it followed, as a matter of course, that such assent might be granted upon such terms and conditions as those states might think proper to impose, and that those states may exclude foreign corporations entirely, or restrict their business to particular localities, or may exact such security for the performance of their contracts with their citizens as in their judgment will best promote the public interest. And in *Bank of Augusta v. Earle,* 13 Pet. 519, occurs language to the same general effect.

However, in *Insurance Company v. Morse,* 20 Wall. 445, 456, this court, in referring to both of the cases last cited, said that the general language therein used was to be expounded with reference to the subject then before the

court, and that these cases laid down principles in general terms which were to be understood only with reference to the facts in hand, and that nothing contained or said in these cases was intended to impair the force of the language used by Mr. Justice Curtis in *LaFayette Ins. Co. v. French*, 18 How. 407, wherein he said:

> "A corporation created by Indiana, can transact business in Ohio, only with the consent, express or implied, of the latter state. This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other states, and by this court; *provided, they are not repugnant to the constitution and laws of the United States*, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.
> * * * * * * * * *
> *None of the cases so much as intimate that conditions may be imposed which are repugnant to the constitution and laws of the United States*, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by others." (Italics ours.)

In *Dayton Coal & Iron Co. v. Barton*, 183 U. S. 23, affirming a judgment of the Supreme Court of Tennessee sustaining the validity of a statute of that state, prescribing that corporations and other persons, issuing store orders in payment for labor should redeem them in cash, and providing a legal remedy for *bona fide* holders of such orders, this court said:

> "We do not care, however, to put our present decision upon the fact that the plaintiff in error is a foreign corporation, nor to be understood to intimate that state legislation, invalid as contrary to the constitution of the United States, can be imposed as a con-

dition upon the right of such a corporation to do business within the state."

In *Lochner v. New York*, 198 U. S. 45, 56, this court said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—becoming another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint.

This is not contended for. In every case that comes before this court, where legislation of this character is concerned, and where the protection of the federal constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor."

In *Adair v. U. S.*, 208 U. S. 161, 174, after quoting from *Lochner v. New York, supra*, this court said:

"While, as already suggested, the rights of labor and property guaranteed by the constitution against deprivation without due process of law, are subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in

> the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another."

Under the same process of reasoning it would appear, equally, that it was not within the functions of government to compel plaintiff in error herein to enter into a contract,—not only without its assent—but without affording it any opportunity to assent or dissent.

In *Coppage v. Kansas*, 236 U. S. 1, in considering a statute of that state similar to the federal statute involved in the Adair case, and in holding the Kansas statute unconstitutional, under the principles enunciated in the Adair case, this court said:

> "Included in the right of personal liberty and the right of private property,—partaking of the nature of each,—*is the right to make contracts for the acquisition of property.*
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> * * * * * * * * *
>
> An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state. But, notwithstanding the strong general presumption in favor of the validity of state laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power.
>
> But the Fourteenth Amendment in declaring that a state shall 'not deprive any person of life, liberty or property, without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as co-existent human rights, and debars the states from any unwarranted interference with either.
>
> And since the state may not strike them down directly, it is clear that they may not do so indirectly, as by declaring in effect that the public good requires the removal of these inequalities that are but the normal and inevitable result of their exercise, and then

> invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

As hereinbefore stated, the question of the validity of state statutes enacted in attempted exercise of the police power of the state for the purpose of regulating the business of foreign corporations,—and especially foreign insurance companies,—transacted within the state, has involved consideration of statutes forbidding or nullifying certain conditions or requirements sought to be incorporated in the policy contract; of statutes requiring that *if a foreign corporation elects to make a contract within the state*, it shall make it upon a rate or basis of compensation to be prescribed by the state; or that having elected to do business within the state *its contracts* must conform to the form and conditions prescribed by the laws of the state; but we know of no case that has heretofore come before this court wherein was involved the question of the validity of a state statute amounting in effect to in many instances creating a contract between a private person and a corporation, foreign or domestic, without giving the party to whom the proposal to contract was made, any opportunity whatsoever to accept or reject such proposal; in other words, having the effect of converting a mere application into a completed contract.

In *Adair v. U. S., supra*, this court quoted from *Cooley on Torts*, page 278, as follows:

> "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon

> reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress."

It appears to be clear, therefore, that while property rights, guaranteed by the constitution against deprivation without due process of law, are subject to certain reasonable restraints, of real and actual necessity to the common welfare, the police power of a state cannot be validly invoked or exercised in a manner that is unfair and unreasonable, and that constitutes, in practical operation and effect, an arbitrary interference with a well recognized property right, viz., the right of contracting, or of refusing to contract. Further, that this particular right is so essential to the acquisition and enjoyment of property, and to the privilege of pursuing an ordinary business or trade, that it can only be validly curtailed or abridged on the ground of absolute necessity.

II.

In sustaining the validity of Section 4902 the Supreme Court of North Dakota said that the statute recognized the practical necessity for a prompt decision upon applications for hail insurance; that an applicant for hail insurance *was prone to rely upon his application being accepted,* until notified to the contrary, and would not ordinarily seek other insurance in the interim; that under the practice *which, but for the statute, could not be said to be unreasonable,* the applicant for hail insurance would be uncertain whether or not his application was accepted,

and this not only during the period of transmission, but during the period required to notify him of the non-acceptance through agents selected by the company; that in view of the foregoing considerations it needed no argument to demonstrate that the employment of *the usual means* for completing the negotiations looking toward the issuance of a policy would *frequently*, in absence of the statutory regulation, *result in the disappointment of the applicant* and deprive him of the benefit of the insurance at a time when it was most needed and when he would have reasonable grounds for believing that his risk was covered (R., 62-63).

Continuing, the State Supreme Court said that in recognition *of the necessity for the prompt consummation of the business of hail insurance*, the legislature had set a limit of twenty-four hours for the rejection of an application, which, *in view of the peculiarities attaching to this form of insurance, the court could not say was unreasonable;* as it would seem that foreign, as well as domestic, insurance companies could so arrange their methods of transacting business in the state as to enable them to pass definitely upon the desirability of a given risk within the twenty-four hour period allowed by the statute. That the statute imposed this duty, held the company liable for the insurance applied for, and fixed the measure of liability for a breach of the duty (R., 63).

In its opinion the North Dakota Supreme Court recognized the usual practice obtaining in the state in the matter of transacting the business of hail insurance.

As shown by the record, the experience of years has demonstrated that in states where hail storms are of frequent occurrence,—as is the case in North Dakota,—hail

risks cannot be written at a profit (without making a prohibitive rate), over a given number of years, unless a limit of coverage, or amount of risk assumed, be placed upon each section of 640 acres; consequently, as testified by Mr. Nugent (R., 45), all hail application blanks limit the total liability on a given section.

It is further a matter of common knowledge in the state of North Dakota, and was stated by Nugent (R., 46), that it is a common occurrence for a man living on a certain section of land to do his trading and procure his insurance in one town, while his neighbor, living upon the same section, trades and places his insurance in some other town; a given insurance company having an agent in both towns.

Instances of this character are very common in North Dakota, owing to the unusual paralleling of railroad main lines and branches.

Now if each local soliciting agent was authorized to issue hail policies immediately upon receipt of applications it is not unreasonable to assume,—in fact experience has often demonstrated it to be the case,—that immediately following a given hail storm the company would find itself covered on certain sections in an amount far in excess of its established limit; due solely to the fact that several local agents, residing in different towns, had written on the same section at practically the same time, each in ignorance of the other's act.

In order to obviate this contingency of overwriting on any one section the companies engaged in the business of insurance against hail have found it necessary, in order to conduct this class of business at a profit, and at the same time at a rate not prohibitive, for each company to have central offices or agencies to which all hail applications

are sent and "mapped" before being acted upon.

For these reasons, and in view of its being impossible to write this class of business on any other basis, it is not expedient or feasible to allow local agents to issue hail policies at the time of taking applications therefor.

The foregoing considerations do not ordinarily apply to insurance against fire, for various reasons. In the first place, most of the underwriting done by a local fire agent covers property in his home town, and immediate vicinity. In the second place, if a local agent in one town should issue a policy of fire insurance on the house and farm buildings of A, and the local agent of the same company in an adjoining town should issue a similar policy to B, a neighbor of A and residing on the same section, there would be no element of extra-hazard,—as would be present in case of hail insurance,—owing to the improbability of fire from one place communicating to the other.

In the case at bar the particular central office or agency of the insurance company, whereat the "mapping" was done, was at the city of Waseca, Minnesota; but granting, for sake of argument, that it would be perfectly feasible for the insurance company, in the matter of transacting its hail insurance business in the state of North Dakota, to establish a central agency or mapping office at a certain centrally located point in North Dakota, or in every city in said state, *or at the county seat in every county therein,* it would still be impossible in numerous instances for applications to reach such agency within the twenty-four hour period allowed by the statute; as was recognized in the dissenting opinion of Judge Robinson (R., 66).

Under Section 7938 C. L. North Dakota, 1913, the Supreme Court of that state took judicial notice of the ordi-

nary time of railroad trains, and of the facilities for business, by railroad, telegraph and telephone, between two certain places, as well as of the distance of a place from the county seat or from the capital of the state, and of the geographical position of towns in the county.

Consequently, and apart from the testimony of the witnesses Dunlop (R., 35), Larson (R., 39), and Campbell (R., 41), the Supreme Court of North Dakota was charged with knowledge, which is imputable to this court in reviewing the judgment sought to be reversed, *Pennington v. Gibson*, 16 How. 65; *Varcoe v. Lee*, 1 Pac. 223 (Calif.); *Salt Lake City v. Robinson*, 39 Utah 260; and *Parkes v. Burkhart*, 172 Pac. 908 (Wash.), of the following facts:

That numerous lines of railway within the state only had one mail train a day each way. That consequently if an application was taken by a local agent at a given point on any one of these lines, two or three hours after the departure of the one mail train for that day going, for instance, south, the application could not possibly be mailed until the following day, and, allowing for the running time of said train from the point where the application was taken to the nearest city, or even to the county seat, a period of over twenty-four hours would necessarily elapse between the time said application was taken by the local agent, and the time of its receipt in the post office at the city or county seat where the mapping agency was located; without taking into account the time necessary for distribution and delivery of mail at the latter point. That in many of the counties in said state towns were so located that communication by mail with the county seat was a matter of thirty-six to forty-eight hours. That on some twelve branch lines running from points in the northern

part of the state, southerly and southeasterly to the main line of the Great Northern Railway, there was only one mail train per day, each way, and that the same was true as to branch lines of the Northern Pacific Railway, and the Minneapolis, St. Paul and Sault Ste. Marie Railway, in said state, that in fact, as testified by Mr. Larson, superintendent of mails at the city of Bismarck, there were stations in the state from which mail only went out once a week.

It was therefore evident to the Supreme Court of North Dakota, both from facts of which it took judicial notice as well as from the testimony of the post office officials at the cities of Grand Forks, Fargo and Bismarck, that the only way in which either domestic or foreign insurance companies could so arrange their methods of transacting business in the state as to enable them to comply with the statute, would be to authorize the issuance of hail policies by every local agent taking applications therefor; thus enforcing and imposing a condition upon the companies that, in view of the considerations and peculiarities of the hail insurance business hereinbefore stated, and which were recognized by the North Dakota Supreme Court, would be entirely impracticable and unfeasible.

In *Coppage v. Kansas*, 236 U. S. 1, this court said:

> "When a party appeals to this court for the protection of rights secured to him by the federal constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, *but rather upon its operation and effect as applied and enforced by the state;* and upon these matters this court cannot, in the performance of its duty, yield its judgment to that of the state court. *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, and cases cited."

In re Opinion of Justices, 220 Mass. 627, 108 N. E. 807, that court said:

> "While reasonable classifications may be made by the legislature in the interests of the public health, public safety, and public morals, yet there must be some rational relation between the object to be attained and the classification, in order that it may not violate the constitutional guaranty, that all persons, *including corporations*, shall be equal in the protection afforded by the laws."

It was stated in the opinion of the Supreme Court of North Dakota, that the "necessity" for the enactment of Section 4902 arose from the fact that an applicant for hail insurance is prone to rely upon his application being accepted until notified to the contrary, and that consequently employment of the usual means (which the court said were not unreasonable) for completing negotiations looking toward the issuance of a policy would frequently, were it not for the presence of the statute in question, result in the disappointment of the applicant and deprive him of the benefit of this insurance at a time most needed, and during which he would have reasonable grounds for believing that his risk was covered.

Conceding, as was held by this court in *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, that the business of insurance is affected with a public interest, can it be said that in the due exercise of the police power a state may enact a statute that has the effect of transforming a mere proposal into a completed contract, when it is evident that the object and purpose of the statute is merely to make harmless, if not in fact encourage, procrastination on the part of the applicant?

It is of course a matter of common knowledge that the

farmer is not interested in procuring insurance against hail until he has assurance to some degree, at least, that he is going to have a crop. It follows, therefore, that it is not to be expected that a farmer desiring insurance against hail will apply and pay for the same the instant that the seed is planted, but it is reasonable to suppose, and to assume, that in the exercise of reasonable care and diligence the farmer who is desirous of obtaining that class of insurance will apply for the same with reasonable dispatch when it has become evident that the seed has germinated, and that barring adverse conditions, apart from hail, a crop will be assured.

As a matter of fact, what is said in the opinion of the Supreme Court of North Dakota justifies the inference that Section 4902 was passed in recognition of the fact,—which in truth is a matter of common knowledge,—that the average applicant for hail insurance is prone to procrastinate and wait until the last moment before making his application for the same, and it is further a matter of common knowledge that this procrastination is not excused by financial considerations, such as lack of ready money for payment of premium, for the reason that it is the universal practice for farmers to give notes, either direct to the company or to the local bank, in payment of these premiums, said notes maturing at a time during the following fall or winter sufficient in which to allow the farmer to pay the same from the proceeds of his crops.

Generally speaking and broadly stated, the so-called police powers of a state relate to the safety, health, morals and general welfare of the public. It is evident that the statute in question has no connection with the public safety, health or morals; consequently its validity must

depend upon its reasonable application to the matter of general welfare.

In *State v. Redmon*, 134 Wis. 89, 114 N. W. 137, a leading case on police power, in discussing the general subject of police power, Mr. Justice Marshall said:

> "If it were true that all police regulations are legitimate which are reasonable, and all are reasonable which the legislature so wills, the constitution, as to very much of the field of civil government, would be of no use whatever. The contrary has been the rule without any legitimate question since *Marbury v. Madison*, 1 Cranch, 137.
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> * * * * * * * * *
>
> 'The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to the objects, *or is a palpable invasion of rights secured by the fundamental law*, it is the duty of the courts to so adjudge, and thereby give effect to the constitution' (*Mugler v. Kansas*, 125 U. S. 623, 661).
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> * * * * * * * * *
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> It is not every enactment which will to some extent promote the public health, comfort or convenience, which is legitimate. Otherwise the way would be open for legislative interference with the ordinary affairs of life to an extent destructive of many of the most valuable purposes of civil government.
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> * * * * * * * * *
>
> The doctrine that the police power is really *a law of necessity* forms the key, it would seem, with which to unlock the mysteries, as far as practicable, of what is within and what is without the limits of such power. Not that a police regulation in form or pretense, to be one in fact, must supply some absolute essential to the public welfare, *but that the exigency to be*

met must so concern such welfare—be sufficiently vital thereto—as to suggest some reasonable necessity for a remedy affordable only by legislative enactment, as to efficiently invite public attention thereto, it being regarded as a legislative function to primarily pass upon the matter.

* * * * * * * * *

As said in *Lawton v. Steele*, 155 U. S. 133: 'To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, *require such interference;* and, second, *that the means are reasonably necessary for the accomplishment of the purpose*, and not unduly oppressive upon individuals.'

Controlling significance should be attached to the words above quoted 'the interests of the public generally,' etc., 'require such interference.' Not that some individuals now and then, or even generally, demand it, or require it, but that the interests of the people generally require it. In other words, that it is reasonably essential or necessary to such interests that the subject thereof should be dealt with by the legislature.

* * * * * * * * *

The inquiries to be solved in testing an enactment purporting to be for the protection of the public health, as to whether it is fairly within the field of police power, are well stated at Section 143 Freund Police Power, thus: 'Does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? *Is the restraint or requirement in proportion to the danger?* Is it possible to secure the object sought without impairing essential rights and principles?' The judgment of the legislature, of course, as to all of them, is to be taken as correct, unless it appeared to be clearly wrong; and also it is to be taken as true that its ostensible purpose is its actual purpose, unless the contrary clearly appears.

* * * * * * * * *

As we have seen, legislative interference with property or other private rights, for the ostensible purpose

> of promoting public health and public comfort, or both, to be valid, must be adapted to that end, not merely to make effective mere individual dictation. It must neither deal with a matter not in reason forming a proper subject for police regulation, nor deal with a proper subject therefor *by means which are clearly unreasonable for the accomplishment of the purpose, nor which are oppressive. Lawton v. Steele*, 152 U. S. 133, 137.
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> In general, as before shown, *all police regulations must bear the judicial test of reasonableness under all the circumstances.* This doctrine is being more and more emphasized as the number of police regulations multiply, evincing a tendency to fence in individual freedom as to matters not formerly so narrowed by legislative enactments. * * * It is said in *Plessy v. Ferguson*, 163 U. S. 537, that every legislative exercise of the police power must be reasonable, and in *Rideout v. Knox*, 148 Mass. 368, *that reasonableness is one of the inherent limitations of such power.*" (Italics ours.)

In the subsequent case of *Bonnett v. Vallier*, 136 Wis. 82, 116 N. W. 885, the same justice said:

> "Reasonable as applied to a law is manifestly not what extremists upon the one side or the other would deem, in the light of the principles referred to, and the situation to be dealt with, fit or fair. It is what, 'from the calm sea level,' so to speak, of common sense, applied to the whole situation, is not illegitimate in view of the end to be attained. In determining that, the court must look to the language of the statute, and to all the facts bearing on the situation of which it may properly be said to judicially know because of their common nature or otherwise. *People v. Durston*, 119 N. Y. 569; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 8."

In view of the foregoing, which in substance is merely a repetition of previous expressions of this court, can the statute under consideration stand the test, or is it a

"palpable invasion of rights secured by the fundamental law," as well as fatally unreasonable?

It was said in *State v. Redmon, supra*, that "the doctrine that the police power is really a law of necessity, forms the key, it would seem, with which to unlock the mysteries, so far as practicable, of what is within and what is without the limits of such power." This presents the pertinent inquiry; does the statute in question fill or supply a necessity of such character or exigency as to justify, as the admitted result of its practical application, the imposition of completed contracts, involving liability running into hundreds of thousands of dollars, wherein one of the parties thereto has been absolutely deprived of an opportunity to accept or reject the proposals upon which such contracts are predicated?

We are absolutely unable to see wherein the matter of expedition and despatch involved in consummating a contract of hail insurance is of such peculiar character, or of any greater or more importance than that required, or at least desirable, in any other transaction involved in usual business intercourse.

Persons engaged in practically every line of business are of necessity interested in the reasonably prompt acceptance or rejection of their offers of sale or purchase, and consequently the man of ordinary care and diligence is governed, in the matter of time, by considerations resulting from his knowledge and experience of the usual time necessary, under ordinary circumstances, to complete a given transaction, or to obtain action upon his offer or proposal; and acts accordingly.

Viewed as a general proposition there appears to be no substantial reason, either in theory or practice, why a per-

son desiring insurance against hail should delay applying therefor until such time as to render it absolutely necessary that his appication therefor be converted into a completed contract within twenty-four hours; any more than that an offer or order made or given by an owner of a retail lumber yard at any point in North Dakota to a wholesale lumber dealer or concern doing business within the state, should be, by force of some statute, transformed into a completed contract at the expiration of twenty-four hours from the time of the making out (*not mailing*) of said order.

While it is freely admitted that foreign corporations, and especially foreign insurance companies, are subject in a large degree to state regulations and statutes, governing the transaction of business within the state, it would equally appear to be true that the validity of drastic legislation of the character herein involved could not be sustained in the absence of clear and convincing evidence of a necessity therefor commensurate with the character of the penalty imposed.

We do not believe that an insurance company, or any other kind of a corporation, or person, can legally be required to invest and clothe every soliciting agent in its employ with authority to accept a proposal and complete a contract, where no further necessity for such an unreasonable requirement be shown than is evidenced in this case; and it is apparent that in order to avoid the penalty of being bound by a contract, without having the option of accepting or rejecting the same, every insurance company, foreign as well as domestic, doing business within the state of North Dakota, must, in view of the statute here in question, clothe every soliciting agent with the authority

in the respect indicated.

There is a further consideration to be taken into account, as bearing upon the reasonableness of the claim of the insurance company that it be allowed the opportunity at least of examining the application before entering into a policy contract, predicated upon the holding of the Supreme Court of North Dakota that the application in question was within the purview of the statute, although it requested other forms of insurance in addition to that against hail.

The record discloses (R., 6, 7), that the application contained a request for insurance upon growing crops against loss, damage, or failure from hail *or any other cause* except fire, floods, winter kill or failure on the part of the applicant to properly prepare the ground for seeding and properly seed, care for, harvest, protect and thresh said crop during the crop season of 1917.

It thus appears that the indemnity therein applied for was to cover loss, damage or failure arising, among other things, from drought, hot winds, rust or other form of germ infection, grasshoppers, and other insects, as well as from hail and other causes not specifically excepted.

It is therefore evident that the willingness of the company to furnish indemnity of the character indicated, would, to an important degree, be entirely dependent upon existing conditions as disclosed and evidenced by the application, as well as those concerning which the company was possessed of general knowledge.

That is to say: Prior to consenting to issue a policy of this character it was most important for the company to know whether the crops to be covered were of a good stand and in good condition; whether they had already

suffered damage from drought or other causes; whether the lands involved were infected with quack grass, Russian thistle, wild oats, or alkali; the depth and character of the soil; whether the crops were located in a territory infested with grasshoppers, etc., all for the reason that *if it decided to issue the policy applied for, the company would thereby guarantee that the crop insured would thresh out at least $7 per acre as a whole;* failing in which the company engaged to make up the deficit.

Furthermore, it was equally important, considering the precise and exceptional character of the indemnity, that the company should be furnished with the opinion of its local agent with reference to the character and qualifications of the applicant.

Of course it is at once apparent that none of the above considerations are of any importance, or have any bearing, as applied to an application for indemnity against loss or damage by hail alone, but nevertheless the Supreme Court of North Dakota held that notwithstanding the additional indemnity features called for by the application and to be included in the policy, if one issued, the section in question applied, for the reason that the application was one for hail insurance, as well as other insurance, and that the loss was occasioned through hail (R., 62).

To our mind the character of reasoning adopted by the Supreme Court, in this respect, *confused the particular element in fact causing the loss or damage, with the character of risk or hazard contemplated by the form* of contract applied for in the case at bar.

In other words: The defendant company was asked to indemnify plaintiff against any loss or damage resulting from *any one* of a number of risks of varying character, *as*

to any one of which it would stand obligated to the extent of the face of its policy. This being the case, and it being wholly uncertain, *at the time of acting upon the proposal,* which risk ultimate loss or damage would result from, if at all, it necessarily follows *that the character of the application or proposal must be determined and fixed as of the time it was made,* rather than at the time of the loss.

However, as the Supreme Court of the state has construed the statute as applying to applications for insurance of the character herein involved, it would appear to follow that in determining the reasonableness of the statute this court is entitled to take into consideration the various additional facts and circumstances with reference to which the insurer was absolutely entitled as a matter of right to have knowledge, before exercising its election to accept or reject said application.

Under the facts disclosed by the record the construction given to the statute by the Supreme Court of North Dakota must necessarily in many instances result, as in the case at bar, in charging an insurance company with liability predicated entirely upon contractual relations (created solely by the statute) as to the existence of which it was absolutely ignorant.

While the State Supreme Court seeks to justify on the ground of necessity for prompt consummation of the business of hail insurance, it is worthy of note that there is absolutely no evidence in the record, or any facts upon which to warrant the presumption, that this particular class of business had not been theretofore conducted with as reasonable promptness and despatch as any other class; in fact the state court admits that "but for the statute"

the practice theretofore prevailing "could not be said to be unreasonable."

Thus not only the record, but the opinion of the State Supreme Court, clearly indicates *that there was no existing abuse to be corrected*, or that the matter of consummation of contracts of this class was subject to any greater delay than other contracts of similar, or any other, character.

If this be the case, how can the validity of the statute be sustained as "a law of necessity," which under the doctrine stated by Mr. Justice Marshal, in *State v. Redmon, supra*, "forms the key * * * with which to unlock the mysteries * * of what is within and what is without the limits of" the police power?

As heretofore stated, the South Dakota statute, similar in character, allows five days before the contract takes effect by operation of statute. Both statutes were enacted the same year (1913), and while, in the enactment of statutes under the so-termed police power great latitude is allowed the legislature in the exercise of its discretionary powers, the wide divergence in the time limit, confirms, to our minds, the absolutely unreasonable character of the North Dakota statute, in that respect, as well as others hereinbefore discussed.

For the reasons hereinbefore stated we feel that the statute in question is unconstitutional in that it deprives this plaintiff in error of a property right, viz., the liberty to contract; of property without due process of law; that it further operates in numerous instances to bind this plaintiff in error by a contract not only as to which it had no knowledge whatsoever, but with reference to the entering into which it had no option; and, finally, is most unreason-

able in its requirements. That consequently it should be adjudged unconstitutional, and the judgment of the North Dakota Supreme Court be reversed.

Respectfully submitted,

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NATIONAL UNION FIRE INSURANCE COMPANY,

Plaintiff in Error,

vs.

ROBERT WANBERG,

Defendant in Error.

In Error to the Supreme Court of the State of North Dakota.

Brief for Defendant in Error

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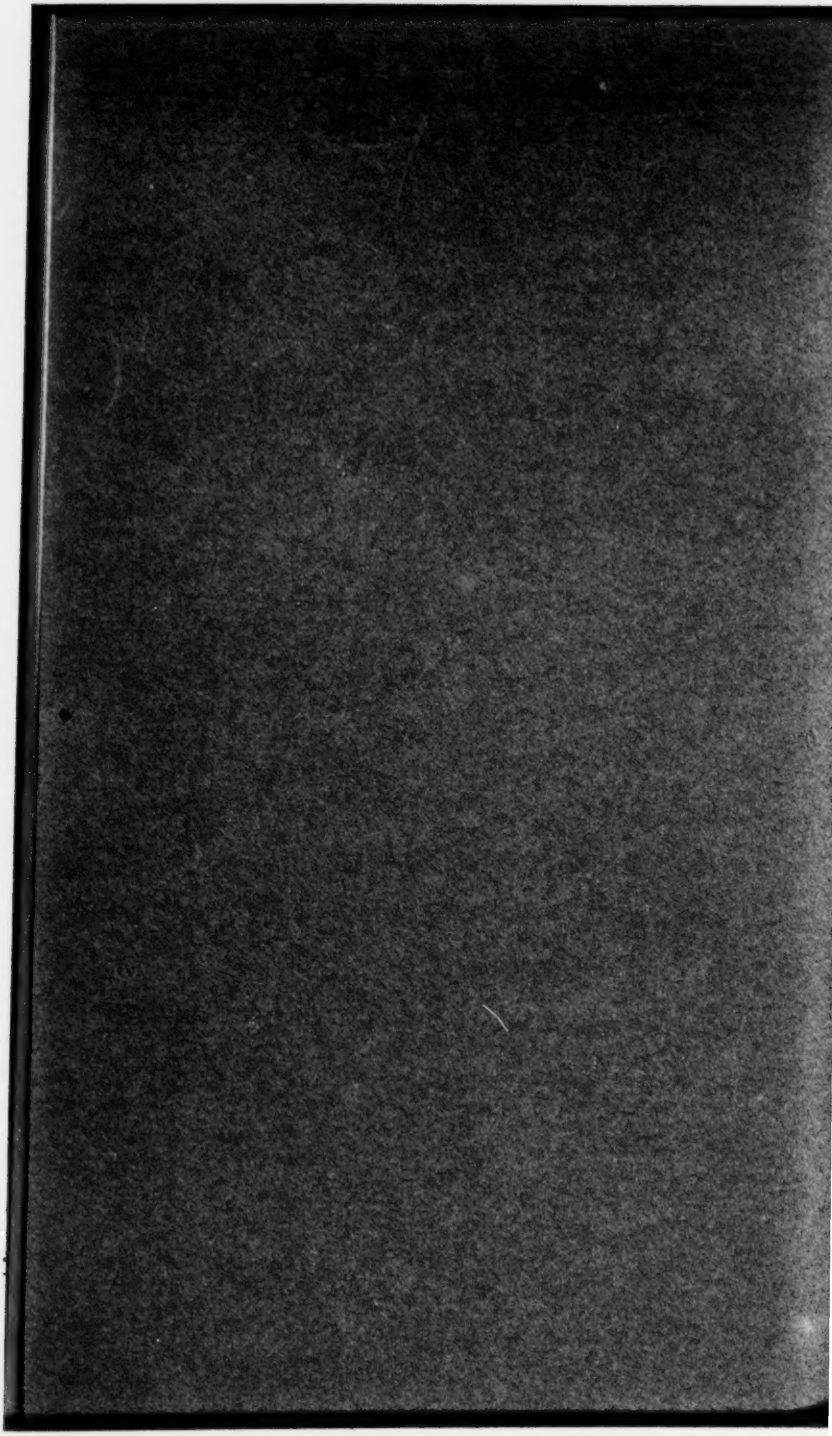

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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 233

NATIONAL UNION FIRE INSURANCE COMPANY,
Plaintiff in Error.

vs.

ROBERT WANBERG,
Defendant in Error.

In Error to the Supreme Court of the State of North Dakota.

Brief for Defendant in Error

STATEMENT OF THE CASE

The plaintiff in error has fully and fairly stated the facts in the case, in that the questions for consideration of the court is purely to determine whether the statute of the State of North Dakota violates the Fourteenth amendment of the United States Constitution, which statute reads as follows:

> "Every insurance company engaged in the business of insuring against loss by hail in this state, shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and the hour the application for insurance has been taken by the authorized local agent of said company, and if the company shall decline to write the insurance upon receipt of the application, it shall forthwith notify the applicant and the agent who took the application, by telegram, and in that event, the insurance shall not become effective.

Provided that nothing in this article shall prevent the company from issuing a policy on such application, and putting the insurance in force prior to the expiration of said twenty-four hours." (Section 4902 of the Compiled Laws of North Dakota 1913.

ARGUMENT.

Plaintiff in error sole contention in this court is that such statute does not come within the police powers of a state and that it violates the Fourteenth amendment in that it deprives insurance companies doing a hail insurance business with the State of North Dakota of the liberty of contract, or property, without due process of law.

At the outset permit us to call to the attention of this court to the fact, of which the court may take judicial notice, that the State of North Dakota, as well as other states of the northwest, are located geographically in the wheat growing territory of the country, and that according to government census approximately eighty per cent of the people of this state are engaged in the business of growing wheat and other grain crops during a growing season that is short; that the legislature of this state has to do largely with the consideration and enactment of laws peculiarly fitted to the protection and encouragement of the business in which the citizenship is engaged and by reason thereof are charged with the duty toward the people whom they represent to enact such laws as are highly beneficial to the grain growing inhabitance of such state; that one of the things deemed necessary for the encouragement and protection of the inhabitance of the State of North Dakota is adequate laws referring to the insurance of those crops against loss and damage by hail, in fact the

idea of such legislation has been encouraged to such a marked degree, not only in North Dakota but in other of the west-central group, that the state itself by popular vote of its people has gone into the business of protecting the grain growers against such losses and damages.

Thus in the exercise of its protection of its people the State of North Dakota in the exercise of its legislative police powers has seen fit to declare, in the words of the statute attacked, what shall constitute insurance of crops against loss or damage by hail, and justly so because of the conditions of the climate and the particular business engaged in by the large percentage of its people.

The laws and policy of a state may be framed and shaped to suit its conditions of climate and the exercise of the police power may and should have reference to the **peculiar situation and needs of the community.**

Mr. Justice McKenna announcing the opinion of the court in the case of Bacon vs. Walker 204 U. S. 310 stated the following:

> "The police power of a state is not confined to the suppression of what is offensive, disorderly or unsanitary, but embraces regulations designed to promote the public convenience or general prosperity" * * * * "The laws and policies of a state may be framed and shaped to suit its conditions of climate and soil"

and again Mr. Justice Day reviewing a statute of the State of Louisiana in the case of ex re McLean & Co. vs. D. & Rio G. Ry. Co. 203 U. S. 38-55 regulating to brands of hides said

> "The exercise of the police power may and should have reference to the peculiar situation and needs of the community"

and in the Utah irrigation cases reviewed by this court Clark vs. Nash 198 U. S. 362-368; Strickland vs. Highland Boy Gold Co. 200 U. S. 528, and in the case of Offield vs. N. Y., N. H. & H. R. Co. 203 U. S. 377 Mr. Justice McKenna commenting on the foregoing decisions of this court said

> "In the first case (Clark vs. Nash) it was said that public policy of the state declaring the character of use of property, depends upon facts surrounding the subject. In the second case it proved that there might be exceptional times and places in which the very foundation of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which under other circumstances would be left entirely to voluntary consent."
>
> "The public had an interest and to accomplish it the court applied the statute."

Thus we find that the court has sustained state laws, under the rule of police power, in cases involving taking of private property for irrigation purposes the right to take corporation stock or use it for purposes of repairing and improving the private property the right to assess damages in violating misuse of public range as well as to declare a penalty when a regulation relating private brands of live stock was violated, all for the reason that the state has a right to pass laws peculiar to the circumstance and condition of the case when the people or legislature has deemed it for the convenience or general prosperity of the public of th community or commonwealth.

Hence in the State of North Dakota, as well as other states where the people are largely engaged in the grain industry, the legislatures have deemed it ncessary to pass laws rgulating hail insurance, and in the state where the

statute in question is the law it has seen fit to declare by this act that

> "The insurance shall take effect from and after twenty-four hours from the day and hour the application for insurance has been **taken** by the authorized local agent of the company."

Not twenty-four hours from the time an application is mailed or made out but from the time it is **taken** by an **authorized** agent of the company in effect declaring when the risk is complete, and in effect the **taking** by the authorized agent is a **taking** by the company or rather his acceptance is the company acceptance for the purpose of protection of the grain grower. That is when the authorized agent of any insurance company doing a hail insurance business within the State of North Dakota accepts the grain-grower's application and takes his money it amounts to an acceptance by the principal of the risk, subject however to certain rights of the company to cancel the same by doing certain acts promptly.

It does not create a contract as contended by plaintiff in error

> "Between private persons and a corporation, foreign or domestic, without giving to the party to whom the proposal to contract was made, an opportunity whatsoever to accept or reject such proposal (Brief p. 21)

it simply declares what conditions makes a contract, the statute does not say a mere application or proposal shall constitute a binding obligation, it does not say that an application given to a solicitor of hail insurance is binding, but does say that when an application is **taken** by a duly constituted agent of the company then within twenty-four hours there shall be a liability. The constituted authority

of an agent licensed under the state laws in cases of hail insurance is given twenty-four hours to act, to accept or reject. He has inspected the farmers crop, he has taken the money for the premium, he has talked with the farmer and knows the conditions, he is the authorized representative under the law of the company; there is no moral risk involved; no conditions of necessities arise for further consideration; public convenience, prosperity and protection of its people engaged in the growing of grain demands speedy action during the short growing seasons; delay means a catastrophe in case a hail storm should strike, wiping out the great wheat fields constituting the wealth of not only the people but of the state and therefore the legislature of the state has said it is a subject which requires regulation and

> "When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the court under the Fourteenth amendment unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." Missouri etc. Ry. Co. vs. May 194 U. S. 267-269.

This statute applies alike to all, it says

> "EVERY INSURANCE COMPANY * * * insuring against loss by hail"

no distinction between foreign or domestic, no distinction as to location, no distinction of agency, but all or everybody insuring against loss by hail. The plaintiff in error was for a number of years duly licensed to do business in this state, (Plaintiff's in error brief p. 2) was admitted to do business within the State of North Dakota under a state license and to be done in accordance with the laws of this

commonwealth, these laws required the licensing of certain agents of this company resident within the state (Sec. 4920 Compiled Laws North Dakota 1913) and when the company licensed such agents it did so under existing laws and conditions of the state, one of those conditions in North Dakota was the state in question providing that when that agent did certain things it became an obligation on the company unless revoked in accordance with the terms of that law. Such condition was invoked alike on all engaged in that particular business; such condition was uniform in its effect; that condition was for the equal protection of the masses of the commonwealth; that condition was peculiar to the climatic condition and industry of the State; it is fair to every person or corporation seeking to do business under it as well as every person asking its protection; it is uniform in its operation.

The legislature of the State imposed a duty upon "Every insurance company * * * insuring against loss by hail" and Mr. Justice Birdzell announcing the opinion of the supreme court of the state in construing this statute says,

> "It is recognized that there is a class of obligations which are implied in law" and further
>
> "We are of the opinion that the legislature can recognize other practices in connection with insurance business which tends to operate prejudicially to the class of patrons and prescribe regulations for their protection."

It operates as a protection to those engaged in a certain prescribed industry which is the industry of developing the resources of the state in that the vast majority of the people are engaged in this particular industry and thus operates for the development and prosperity of the state.

Thus defendant in error contends that such a statute is within the police power of the State of North Dakota legislative bodies.

II.

Referring to the validity of the statute in question and the ruling of the Federal courts referring to constructions of state laws it is repeatedly held

> "The presumption is always in favor of the validity of legislation, state or municipal, and if there could exist a condition of fact justifying the classification or restriction complained of, the courts are bound to presume that it did exist."

Soon Hing vs. Crowley 113 U. S. 703-710

Crowley vs. Christianson 137 U. S. 86

David vs. Massachusetts 167 U. S. 43

Erb vs. Morasch 177 U. S. 584

M. etc. Ry Co. vs. May 194 U. S. 267-269

Fisher vs. St. Louis 194 U. S. 361-371

and consequently the selection in order to become obnoxious to the Fourteenth amendment must be arbitrary and unreasonable not merely possible but clearly so.

Carroll vs. Greenwich Ins. Co. 199 U. S. 401-411

Bachtel vs. Wilson 204 U. S. 36-37-41.

The equally protection of the Fourteenth amendment prescribes no rigid equality, but permits to the discretion and wisdom of the state a wide latitude insofar as interference by the Federal Supreme Court is concerned. It suffices if it is practical, and is not reviewable unless palpably arbitrary.

Orient Ins. Co. Daggs 172 U. S. 557-562; 43 L. Ed. 552

Carroll vs. Greenwich Ins. Co. 199 U. S. 401-411

Bachtel vs. Wilson supra.

In the case of Plessy vs. Ferguson 163 U. S. 537 the court used the following language:

> "In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

This is the real contention in this law suit. If the statute does not violate the perogatives guaranteed under the 13th Section of Article 1 of the Constitution of the State of North Dakota or the 14th Amendment of the Federal Constitution which practically cover the same grounds, then there will be no question that it should be sustained, for it has been repeatedly held that a statute that is uniform in its effect and applies to a class of persons or properties or things equally and uniformly, then such a law is not unconstitutional.

> "A state by enacting that all representations and warranties on which an insurance company proposes to rely shall be attached to the policy does not exceed its power to impose conditions on the rights of the insurance company to do business and to prescribe what conditions may be imposed." 106 N. W. 198—Iowa case; and cases cited.

22 CYC. 1387 and cases cited.

Counsel cites a great number of cases and quotes the court repeatedly, but we have no quarrel with the authorities cited nor do we disagree with the language of the court for the reason that they do not apply in effect to the statute under consideration. The statute does not make different regulations as to the property of different individuals, differently situated, but is uniform in its effect—

that is it effects **an insurance company doing hail insurance business** within the State of North Dakota whether it be a foreign or a domestic organization and treats them alike and it is presumed to be constitutional.

See Constitutional Law, 6 RCL, 12 CJ 949.

These constitutional guarantees do not prohibit the Legislature from prescribing the manner in which contracts shall be made or from providing that certain liability shall fail from making, or entering into certain kinds of contracts, or from pasing laws for the protection of individuals or class of individuals against fraud or unfair dealing.

12 CJ. 950 and cases cited.

The undoubted intent of this statute was to protect the farmers applying for hail insurance from unfair delay in responsibility for loss under hail insurance applications. Companies taking the farmer's application and his money and withholding the policy for several weeks undoubtedly brought about the passage of such a statute, which is fair and uniform in its application to all insurance companies and

> "It is the purpose of the Fourteenth amendment to prevent the states from classifying its subjects of legislature and making different regulations as to the property of different individuals, differently situated. The provisions of the Federal constitution are satisfied if all persons similarly situated are treated alike in privileges conferred, or liabilities imposed."

Field vs. Barber Asphalt Paving Co. 194 U. S. 618.

Norris vs. City of Lincoln, 142 N. W. 114.

It is conceded by the facts in this case that the defendant company was doing business at the time claimed in the State of North Dakota in accordance with and under

the laws of the State (See stipulated facts), such being the condition they must of necessity, and it is presumed that they knew of this law, and knew that it applied to their class of business—consequently they cannot complain now of its effects.

> "A foreign corporation may transact its business within any state, but has no constitutional right to engage in such business and must comply with requirements of the state where it seeks to do business."
>
> 22 CYC 1391
>
> 19 CYC 1260.

Counsel argues that the result of holding this statute operative would force the defendant into a contract without giving the company an option of accepting or refusing for the reason that the statute allows twenty-four hours between the time of delivery of the application to the local agent and the arbitrary conversion of the same to a contract. This appeal to be an arbitrary construction. The simple effect of this statute insofar as it relates to the contract, makes an acceptance by the agent an acceptance by the company but it gives the Head Office or the controlling forces outside the State of North Dakota or within the State of North Dakota an opportunity for twenty-four hours to reverse the judgment of its local agent—in other words, the intent of the statute is to bind the company by knowledge and acceptance of its licensed agent.

Counsel lays great stress upon the mailing proposition and the unreasonableness of time, yet the facts show according to his own record and the stipulated facts that the mail from Tioga, North Dakota, to Waseca, Minnesota, run ~~in twenty-four~~ within forty-eight hours time. Also, contends that the

Court has a right to take judicial notice of the mail service. Conceding that such a construction of the law is acceptable. The law is based upon the knowledge and acts of the local agent of the company doing business and not upon the right of the company or anyone else to maintain a head office in Waseca, Chicago, New York or even London, which would abrogate the effect of this statute. The local agent may be located anywhere in the state, and the statute does not operate until he acts thereunder by taking an application of insurance and I do not intend to argue this matter or cite general authority thereon. It is a matter of stipulation and fact in this law suit that they are doing business in accordance with the insurance law of this state, which question is settled by the State Courts.

CONCLUSION.

In conclusion, it is the sole contention of this defendant in error that he acted in good faith, that the plaintiff in error accepted his money and application for insurance under the laws of the State of North Dakota, that this law is uniform in its effect upon the same individuals similarly situated and treats alike all persons doing business thereunder for the covenience and prosperity of the State. That it is reasonable in its force and has not been abrogated or waived by any acts of the defendant in error and therefore it is constitutional and defendant in error is entitled to have it sustained.

Respectfully submitted,

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